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THE FEDERAL JUDGESHIP ACT OF 2013

HEARING

BEFORE THE

SUBCOMMITTEE ON BANKRUPTCY
AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

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THE FEDERAL JUDGESHIP ACT OF 2013

TUESDAY, SEPTEMBER 10, 2013

U.S. SENATE,
SUBCOMMITTEE ON BANKRUPTCY AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:35 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Christopher A. Coons, Chairman of the Subcommittee, presiding.

Present: Senators Coons, Sessions, and Grassley.

OPENING STATEMENT OF HON. CHRISTOPHER A. COONS, A U.S. SENATOR FROM THE STATE OF DELAWARE

Chairman COONS. Good morning. Please come to order. Welcome to this hearing of the Judiciary Committee's Subcommittee on Bankruptcy and the Courts.

America's federal courts serve as a model for courts and judicial systems around the world. For a variety of reasons, our federal judiciary is, in my view—and I suspect some of the panel might agree—without equal. Presidential appointments and lifetime tenure insulate judges from political influence. Senate advice and consent helps guarantee judicial competence and is itself strengthened by the work of key institutional players such as the American Bar Association, which publishes nonpartisan opinions as to nominees' qualifications. And, fortunately, a federal judicial appointment carries with it sufficient prestige to lure away many talented nominees who might otherwise earn more in the private sector or in academic work. It is overall because of the quality of our judiciary that John Adams' vision that the United States be a Government of laws and not men still holds true today.

It is the role of the judiciary to determine each case according to the law, not according to popularity, political influence, money, or the whims of the public. It is the federal judiciary that protects the least of us against the abuse of our civil rights and liberties, whether by the Government or another private party. We must not, however, take our federal judiciary for granted.

As Chief Justice Roberts noted in his 2010 Year-End Report on the Judiciary, "The judiciary depends not only on funding, but on its judges, to carry out its mission." Unfilled vacancies have led judges in many districts to be, and I continue a quote, "burdened with extraordinary caseloads."

So, too, does insufficient statutory authorization for judgeships burden our courts. Judges on the Eastern District of California, which has long been recognized as one of the most overburdened

in the Nation, would still face over 1,000 weighted case filings per judge even if the vacancy on that court were filled immediately. In my own home in the District of Delaware, judges faced weighted filings of over 1,500 per judge, and there are no vacancies left to fill on that court.

As a point of reference, the Judicial Conference generally believes additional judicial resources are necessary when weighted filings approach 500 per judgeship.

Senior judges eligible for their pension, but willing to forgo potentially lucrative outside employment opportunities or more time with their families, continue to hear cases and are vital in filling the current gaps. But senior judges are, in effect, providing charity to our Government out of their commitment to public service and their colleagues and cannot be the foundation of a responsible long-term judicial staffing model.

Overburdened judges almost by definition cannot provide the level of time and care and reflection they would like to for each case before them, especially in a time of stagnant compensation and high caseloads. That in combination reduces the esprit de corps of the judiciary and makes it marginally more difficult to attract the best and brightest to serve.

Congress has not comprehensively addressed judicial staffing levels since 1990, 23 years ago. Over that time, caseloads have risen nearly 40 percent, yet authorized judicial staffing levels by roughly 4 percent. Put another way, trial court weighted filings per judgeship have risen from 386 in 1991 to roughly 520 today.

Those national figures mask the dire circumstances faced by the most burdened district, such as the Eastern District of Texas and the District of Delaware and the Eastern District of California. That is why Senator Leahy and I have introduced the Federal Judgeship Act of 2013. This is based on the recommendations of the nonpartisan Judicial Conference of the United States, led by Chief Justice John Roberts. It would create six new judgeships in two courts of appeals and 85 new judgeships in 29 district courts, for 91 judgeships overall.

This bill would provide much needed relief to our overburdened courts, ensuring they are better prepared to administer justice quickly and efficiently. Increasing the number of judgeships will help cases move, will reduce uncertainty that prevents businesses from creating jobs, and permit every American who has been wronged their day in court on a reasonable timeline.

I look forward to the testimony today of our eminently qualified panel, which will shed greater light on what the judiciary's need for additional resources is and what it would do if forced to go without.

So I would like now to turn to Senator Sessions for his opening statement.

OPENING STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman, for your leadership and for your contribution to the Senate. Nobody works harder and thinks more seriously about the many issues we face. And I know

you have been wrestling with the Syria question this past week also, as all of us have.

Certainly there appears to be a need for new judgeships in certain areas of our country, but we have to recognize we are in a tight financial situation. We simply do not have the money to do everything that may even be good. But I do have some questions about where we are and the justifications for 91 new federal judges, each one costing approximately $1.1 million. We do not have the money to add 91 federal judges, and we are not going to add 91 federal judges. That is just not going to happen. And I hope you know that, and you have to understand that. It is okay to ask, you know, for what you would like to have, and all of us could, but it is just not going to happen.

About a month ago, this Subcommittee heard testimony about the impact of sequestration on the courts. Judge Gibbons testified that the judiciary has reduced courthouse staffing levels in some areas, such as probation and pre-trial services. Some federal defender programs have been downsized and face some pretty tough cuts, and we have heard from them.

While both House and Senate Appropriations Committees reported bills that would increase appropriations to the judiciary, it is unlikely there will be any resolution of appropriations this calendar year. Given the probability that flat funding will continue, we have to ask, "Can we add a lot of new federal judges?"

Beyond costs, there are other aspects that I think we need to think about. There are 50 vacant judgeships with no nominee. As of today, 37 of the existing judicial vacancies are designated as presenting judicial emergencies; 26 of those are in circuits and districts where the bill would create new judgeships. Perhaps we should reassess the need for judgeships after those seats are filled.

Moreover, I still have concerns about the methodology used by the Judicial Conference to calculate the need for judgeships. GAO, who we ask to do tough work for us, reported on these concerns in 2003, noting that the methodology used by the Judicial Conference does not accurately portray the actual amount of time judges spend on cases. In its report, GAO made a number of recommendations to the Judicial Conference. None of those recommendations have been implemented.

GAO has not updated that report in the decade since its original publication, but much has changed since 2003. There have been a number of technological advancements since that time that have resulted in efficiencies elsewhere in the judiciary, such as automation and videoconferencing. We are also using a lot more mediation. I have requested GAO to undertake a review of the process and methodologies used by the Judicial Conference and the Administrative Office of Courts when developing a request for additional judgeships.

It is important to understand the process the judiciary uses to develop its judgeship recommendations, especially during this time of fiscal restraint.

So, Mr. Chairman, I would like to offer two statements for the record—one from Judge Joel Dubina, who I believe just recently stepped aside, or he may be still the chief judge of the Eleventh Circuit Court of Appeals. The Eleventh Circuit Court of Appeals

has the highest caseload per judge in the country, and they are not asking for new judges. And Judge Dubina lays out, as his predecessor Judge Tjoflat did before this Committee on more than one occasion the advantages of a more collegial and smaller court, and he warns against ever expanding the size of the appellate courts in America. I will offer, Mr. Chairman, his testimony in 2009 concerning this issue.

We just simply have to understand where we are, what we can do, how much efficiency the courts have achieved—and they have achieved some. We have a considerable number of senior judges that are carrying heavy caseloads for which we are most grateful, probably more than we had in 1991 for sure. And we have better clerk situations. Many staff attorneys are in the courthouses that do the prisoner appeals and other specialty cases such as Social Security. And so there are a lot of things the court has done well and should put us in a position to not be forced to add quite this many new judges.

You mentioned Delaware. I see their caseload is one of the highest in the district in the Nation, and they are handling a surge of patent cases. Well, that sounds to me a real justification for us looking to add a judge or more to that district because those are the kind of things that Congress should respond to. We have the greatest judiciary in the world. I am so proud of it. Judges are working hard every day. It is not a retirement job anymore, if anybody ever thought it was.

We thank you all for your good service.

Chairman COONS. Thank you very much, Senator Sessions, and thank you for the recognition that the District of Delaware is in some ways uniquely challenged. I appreciate that input.

Before we begin with witness testimony, I would like to ask all witnesses to stand while I administer the oath, which is the custom of this Committee. Please raise your right hands, if you would. Do you solemnly swear that the testimony you are about to give to this Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge TYMKOVICH. I do.

Judge ROBINSON. I do.

Mr. SEKULOW. I do.

Mr. REED. I do.

Chairman COONS. Thank you. Let the record show the witnesses have answered in the affirmative. And also without objection, submit for the record both the statement and testimony referenced by Senator Sessions.

[The information referred to appears as a submission for the record.]

Chairman COONS. I would also like to enter into the record a statement from Senator Leahy, Chairman of the Judiciary Committee, on the Federal Judgeship Act of 2013. Without objection.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Chairman COONS. Our first witness today is Judge Timothy Tymkovich. Judge Tymkovich is a judge for the Denver-based Tenth Circuit Court of Appeals where he has served since 2003. Judge Tymkovich also serves as Chair of the Judicial Conference's

Committee on Judicial Resources, which is tasked with overseeing the Conference's biannual Article III judgeship recommendations, which in many ways are the very foundation and focus of our hearing today and the basis of the bill which I referenced in my opening statement.

Judge Tymkovich, welcome. Please proceed.

STATEMENT OF THE HONORABLE TIMOTHY M. TYMKOVICH, U.S. CIRCUIT JUDGE, TENTH CIRCUIT COURT OF APPEALS, AND CHAIR, STANDING COMMITTEE ON JUDICIAL RESOURCES, JUDICIAL CONFERENCE OF THE U.S., DENVER, COLORADO

Judge TYMKOVICH. Thank you, Chairman Coons, Ranking Member Sessions, and Senator Grassley. We appreciate the invitation to appear before the Subcommittee today.

As Senator Coons mentioned, I am a circuit judge for the 10th Circuit Court of Appeals located in Denver, Colorado, and I am Chair of the Judicial Resources Committee of the Judicial Conference, the committee that is responsible for developing our judgeship recommendations to Congress.

I am here today to provide information about the judgeship needs of the federal courts and the process by which the Judicial Conference determines those needs.

As Senator Coons mentioned, it has been over 20 years since Congress has passed comprehensive judgeship legislation. Since that time, filings in the district courts have risen 39 percent, while filings in the circuit courts are up over 34 percent. Yet the federal judiciary has seen only a 4-percent increase in judgeships at the district court level, and no circuit judges have been added since 1990.

To ensure that the judiciary can keep on fulfilling its constitutionally mandated role of effectively and expeditiously administering justice, the judicial work force needs to be increased. And to that end, I would like to thank Senator Coons and Senator Leahy for introducing Senate bill 1385, the Federal Judgeship Act of 2013.

The Judicial Conference of the United States supports S. 1385, which reflects the Conference's Article III judgeship recommendations transmitted to Congress earlier this year. Specifically, the Conference recommended that Congress do the following: create five permanent judgeships and one temporary judgeship for the circuit courts; create 65 permanent and 20 temporary judgeships for the district courts; and convert eight current temporary district court judgeships to permanent status. These recommendations reflect the current judgeship needs of the federal courts, some of which have existed since the last judgeship bill passed in 1990.

The lack of additional judgeships, combined with significant growth in the caseload, has created enormous difficulties for many courts across the Nation, but it has reached urgent levels in at least five districts. Senator Coons mentioned the District of Delaware, and we will hear more about that district this morning from Judge Robinson.

The Eastern District of California, the Eastern District of Texas, the Western District of Texas, and the District of Arizona are all

suffering under crushing caseloads. Each of those courts has over 700 weighted case filings per judgeship over the last 3-year period while compared to our standard of 430 weighted cases.

As an example, the Eastern District of California has been dealing with these high caseloads for several years, and despite the use of magistrate and senior judges, with the assistance of over 80 visiting judges from courts throughout the circuit, parties seeking civil jury trials in that district must wait an average of about 4 years for their trials to begin, almost 2 years longer than the national average.

Judge Robinson will talk about Delaware, but the increase in patent filings that Senator Sessions mentioned has really created an enormous burden on that court, with over 1,100 weighted filings per judgeship, the most in the country currently.

The districts of Arizona and Texas, of course, have experienced high caseloads because of their border status and the number of immigration cases that they face.

These facts are not meant to diminish the needs of the other courts in the Conference's recommendation. They just highlight the need across the Nation.

Indeed, the circumstances in those courts are not that much different. Unless their needs are addressed, courts throughout the country will be dealing with critical situations.

That is not to say the Conference recommends or wishes an indefinite growth in judgeships. It recognizes that growth in the judiciary must be carefully limited to the number of new judgeships that are necessary to exercise federal court jurisdiction. Moreover, the Conference is mindful of the economic realities that Congress faces. As such, we acknowledge that all these judgeships may not be created in a single legislative vehicle and that some prioritization may have to occur.

Briefly, as I mentioned in my written testimony, the Conference's recommendations are the result of a six-step biennial survey conducted at the district and circuit level. I detail that process in my written statement, and I will only highlight that the process requires a comprehensive interaction with the requesting courts, my committee, and the Judicial Conference of the United States.

I want to emphasize that any court that does not request an additional judgeship will get one, and the Conference does not consider recommending an additional judgeship if the court does not ask for one.

In sum, the Conference process is a conservative one with each step reviewing whether an additional judgeship is truly necessary. We have tools to accomplish this. We ask for temporary judgeships rather than permanent judgeships. We analyze the use of senior judges, visiting judges, and magistrate judges throughout the system. We look at alternate dispute resolution, mediation, and the use of staff counsel. Through all these tools, we tailor a conservative approach to our requests to Congress and before this Committee. Without these additional resources, the federal courts across the country will begin to struggle to fulfill their constitutionally mandated role.

Thank you for scheduling this hearing so that I may address these issues, and I look forward to answering your questions that follow.

Thank you.

[The prepared statement of Judge Tymkovich appears as a submission for the record.]

Chairman COONS. Thank you very much, Your Honor.

Our next witness is Judge Sue Robinson. Judge Robinson currently sits on the U.S. District Court for the District of Delaware. Judge Robinson was nominated by President Bush on October 1, 1991, and confirmed just over 1 month later—a model for prompt consideration by this body that I might suggest we should try harder to follow today. Having taken office in 1991, Judge Robinson was confirmed shortly following the last comprehensive judgeship bill and can speak to the circumstances since then and the rising caseloads and their impact.

Just as a personal aside, Judge Robinson sits in the seat formerly held by Judge Jane Roth, for whom I clerked on the Third Circuit, and a treasured mentor.

Judge Robinson, it is an honor to have you here today.

Please proceed.

STATEMENT OF THE HONORABLE SUE L. ROBINSON, U.S. DISTRICT JUDGE, DISTRICT OF DELAWARE, WILMINGTON, DELAWARE

Judge ROBINSON. Thank you very much. Good morning, Senator Coons, Ranking Member Senator Sessions, and Senator Grassley. On behalf of the United States District Court for the District of Delaware, I thank you for the opportunity to appear before the Committee today to share with you some information about the court in relation to the Federal Judgeship Act of 2013. And because my time is limited, I will skip my wonderful story about Judge Roth and move on, so hopefully you will read the statement.

Let me step back. The District of Delaware has had four judges since 1985, although we had a vacancy for almost 4 years from 2006 to 2010. In the year 1991, when I first came on the bench, 37 patent cases were filed in the District of Delaware, about nine cases per judge. At that time, even nine patent cases was not an insignificant number of cases per judge. With the exception of 1 year, since the year 2000, the District of Delaware has been among the top five districts in the country in terms of the raw numbers of patent cases filed and has had more patent cases per judgeship than any other district. As of August 31, 2013, there have been 1,394 patent cases filed in the District of Delaware so far in Fiscal Year 2013. The patent filings per authorized judgeship using completed Fiscal Year 2012 was 202 patent filings per judge. You can see how that number compares to other high-volume courts in the graphs that accompanied my statement.

In terms of the statistic that the Judicial Conference of the United States uses to justify the authorization, the current national standard of weighted filings per judgeship is 500 cases. The District of Delaware has 1,812 weighted filings per judgeship, exceeding the national standard by several times.

But it is more than the sheer number of cases that makes our need for the fifth judgeship such a compelling one. Whether you characterize the magnitude of the case load pre-AIA or post-AIA, the complexity of the mechanics to resolve these cases is the same. In other words, whether you have ten defendants in one case or ten cases each with a single defendant, the process starts with motions to dismiss. It goes on to a discovery practice, which is the part of the process, I believe, subject to the most abuse by the bar, and would benefit most from the supervision of the court.

When the parties have completed discovery, the next steps in a patent case typically include claim construction, a requirement unlike any found in other civil cases in the submission of summary judgment motions.

If there are issues left to be tried at the conclusion of this motion practice, you as a judge have to decide motions in limine and conduct the bench or jury trial with the evidentiary disputes that inevitably arise during trial.

Your final responsibility is to review the dispute yet again posttrial. And just when you think you have fulfilled your responsibilities as a trial judge, the case is appealed to the Federal Circuit, which may remand the case back for further proceedings.

And in Delaware, the judges go through this process continually, always with the overlay of technology inherent in patent litigation, whether you are dealing with chemical patents or software patents. Clearly, the mechanics of a patent case are complex and burdensome, and the court's resources to manage the case will never equal the resources of the parties to litigate the case.

In just one of my patent cases tried in this Fiscal Year with a single plaintiff, a single defendant, and ten patents at issue, the parties filed 13 dispositive motions accompanied by 782 pages of briefing, with over 8,500 pages of appendices, 8 boxes of trial exhibits, and with at least 46 lawyers involved in the litigation. And, of course, besides the patent litigation, we also have our criminal caseload and our other civil docket that we need to follow.

So for judges like me who have been on the bench for decades, I cannot really quantify for you the workload associated with the caseload, except that I have two law clerks versus the 46 lawyers in a typical patent case.

I take my responsibilities as a trial judge seriously, as do my colleagues. We have taken an oath to give every party in our court due process, regardless of who the party is, and ensuring due process means giving every party a fair and reasonable opportunity to demonstrate the merits of its allegations. So long as the Patent and Trademark Office continues to issue patents that have the potential for impacting the market, there will continue to be business disputes over the metes and bounds of the monopolies associated with those patents. It is both a privilege and a weighty responsibility to help the parties resolve those disputes, but the court cannot do so without sufficient resources. Due process, not the numbers, is what is driving our request for a fifth judge.

Thank you for your kind attention.

[The prepared statement of Judge Robinson appears as a submission for the record.]

Chairman COONS. Thank you, Your Honor.

Our next witness is Jay Sekulow. Mr. Sekulow is director and chief counsel for the American Center for Law and Justice—the American Center of Law and Justice. I think I misspoke. In that role, Mr. Sekulow has argued a number of high-profile appellate cases before various courts of appeal and the U.S. Supreme Court. Some of his more recent advocacy includes litigation in the D.C. Circuit concerning the Affordable Care Act and President Obama's recess appointments of Commissioners to the NLRB. Mr. Sekulow is an author and frequent blogger and hosts the syndicated daily radio show "Jay Sekulow Live."

Mr. Sekulow, please proceed.

STATEMENT OF JAY ALAN SEKULOW, CHIEF COUNSEL, AMERICAN CENTER FOR LAW AND JUSTICE, WASHINGTON, DC

Mr. SEKULOW. Thank you, Mr. Chairman. Chairman Coons, Ranking Member Sessions, it is a privilege to be before you today on behalf of the American Center for Law and Justice. Thank you very much for the opportunity to allow me to address the Federal Judgeship Act of 2013.

As an officer of the court for more than 30 years and as someone who has litigated, as you mentioned, Senator Coons, 12 cases before the Supreme Court of the United States—I have also presented arguments before the International Criminal Court in The Hague—I have a deep respect for our federal judiciary, and I am honored to be before you today to share my views about how to best preserve what I have seen in my global practice to be the greatest legal system in the world.

Many of my comments today reflect the views contained in a memo that we at the American Center for Law and Justice released in 2009 when Senator Leahy introduced the Federal Judgeship Act of 2009. I have submitted a copy of that and request that it be part of the record.

Chairman COONS. Without objection.

[The information referred to appears as a submission for the record.]

Mr. SEKULOW. While the bill before us today varies slightly from that regarding numbers, I think it is important to point out that there is no question in our view that Congress has a duty to ensure the existence of a federal judiciary that is properly equipped to handle the caseload that is expected of it. And it sounds like, from the previous testimony, patent law must be the area to go into these days. This includes an obligation to ensure the proper number of judges, adequate funding, and as much independence of the judiciary from political influence as is reasonably possible.

With these criteria in mind, the ACLJ agrees with members of this Subcommittee on both sides of the aisle that Congress should create new judgeships when there is a clear and demonstrable need for them. However, even when there is justification for incurring the significant cost that is associated with creating these judgeships, it is imperative that Congress do so in a way that vigilantly guards the independence of the judiciary. We suggest this Subcommittee take the following actions as it debates this bill and it moves forward.

I do want to point out very quickly, though, that when we look at the judicial vacancy situation right now—and I will just focus for a moment on the emergency vacancies—there are at the district court level right now 30 vacancies that are emergencies. Seventeen of those vacancies that are emergencies do not even have a nominee. At the circuit court of appeals, where there are 17 total vacancies, there are seven vacancies that are deemed emergency. Four of the seven vacancies that are emergencies do not even have a nominee. So there is much to be said for the process in regard to nominees as well.

First and foremost, with regard to the bill, we are concerned that the legislation invokes an undue amount of partisan influence into the makeup of the federal judiciary. This concern, in our view, is triggered by both the fact that there is not a delay in the effective date of the legislation and the structure of the temporary judgeships that are created under this Act.

Regarding the effective date, the ACLJ believes as a matter of sound principle that all new judgeships should come into effect after the next Presidential election, be it Republican or Democrat. That removes any taint or hint of partisan nature in this process. It also reduces the appearance to some that it is an effort to pack the courts. And that has been a comment that we have received from a number of people.

Regarding the temporary judgeships created by this Act, the current construct of the legislation does not actually create temporary judgeships but, rather, creates several permanent judgeships to be filled by the current President, and then subsequently eliminates the authority of a future President to fill the vacancy on that same court until sometime in the future. Again, similar to our concerns about the effective date, this construct injects, in our view, too much partisan influence into the process and should be modified to preserve the integrity of the judiciary and retain a proper amount of separation for members of this Subcommittee and the Senate as a whole.

Next, while I indicated that the ACLJ does support the creation of new judgeships when there is a clear and demonstrable need, it is important that we do not fall prey to the suggestion that more is better or bigger is better. There is a high cost associated with every new judgeship. The estimates I have seen run—and I think Senator Sessions said this—approximately $1.1 million a year for every new judge. There have been published reports that new judges are initially, of course, less productive than their more senior peers. That being said, this is a $1 billion bill. As stewards of the American taxpayers' dollars, Congress must give this cost careful consideration.

Further, in our view, there is a strong case to be made that it is often more effective to provide existing judges with additional resources than it is to create new judgeships. In many cases, this produces better results at a lower cost. Although we are perfectly understanding and appreciative of the Committee's concern about following through with where there is real need for new judges, new judges should be moved through the process.

Finally, in our view, it is prudent to consider that an ever-expanding court can lead to instability in the law. This occurs when

you have these jumbo courts or these super tribunals as you see in the Ninth Circuit Court of Appeals. Again, more is not always better: and while Congress has an obligation to ensure that enough judgeships exist and that they have proper resources, it also has an obligation to weigh the cost and to help the courts operate effectively.

In conclusion, the ACLJ thanks this Subcommittee for its dedication to our judiciary and requests that careful consideration be given to these concerns in order to ensure that our taxpayer dollars are spent carefully and in order to preserve the independent judiciary that all of us are rightly proud of.

Thank you, Mr. Chairman, Ranking Member Sessions.

[The prepared statement of Mr. Sekulow appears as a submission for the record.]

Chairman COONS. Thank you, Mr. Sekulow.

Our final witness today is Michael Reed. Mr. Reed is a partner in the Philadelphia office of Pepper Hamilton, where he is a member of the firm's corporate restructuring and bankruptcy practice group and concentrates in the field of bankruptcy and insolvency. Additionally, Mr. Reed chairs the American Bar Association's Standing Committee on Federal Judicial Improvements and is the State delegate for Pennsylvania in the ABA House of Delegates.

Mr. Reed, welcome. Please proceed.

STATEMENT OF MICHAEL H. REED, CHAIR, STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS, AMERICAN BAR ASSOCIATION, AND PARTNER, PEPPER HAMILTON, PHILADELPHIA, PENNSYLVANIA

Mr. REED. Chairman Coons, Ranking Member Sessions, and Senator Grassley. I thank Chairman Coons for helping me shorten my remarks. I am here today at the request of ABA President James R. Silkenat to express our support for Senate Bill 1385, the Federal Judgeship Act of 2013, which is based on the detailed assessment of judgeship needs of the federal judiciary released by the Judicial Conference of the United States. We appreciate the Subcommittee affording me the opportunity to testify. I am a bankruptcy lawyer, and I practice primarily in the federal courts, and I am also a former president of my State bar.

Last month, the American Bar Association's House of Delegates, which establishes policy for the association, unanimously adopted a resolution supporting the enactment of comprehensive legislation to authorize needed permanent and temporary federal judgeships, with particular focus on the federal districts with identified judicial emergencies, so that all federal courts may adjudicate all cases in a fair, just, and timely manner.

Accordingly, the American Bar Association thanks you for introducing Senate Bill 1385 on behalf of the judiciary and applauds you for holding this hearing, which will help highlight a growing problem that should concern every Member of Congress as much as it does the American Bar Association, which is that insufficient resources are diminishing the ability of our federal courts to serve the people and deliver timely justice.

When federal courts do not have sufficient judges to keep up with the workload, civil trial dockets take a back seat to criminal

dockets due to the Speedy Trial Act. This has real consequences for the financial well-being of communities and businesses and the personal lives of litigants whose cases must be heard by the federal courts, for example, cases involving the constitutionality of a law, unfair business practices under federal antitrust laws, patent infringement, police brutality, employment discrimination, and bankruptcy.

The negative consequences of too few judges have been exacerbated by the across-the-board budget cuts mandated by sequestration this fiscal year. Staff layoffs and furloughs and reductions in services and operating hours implemented in courts across the country in response to sequestration have made it even more difficult for courts with too few judges to keep up with caseloads and deliver timely justice.

The combination of too few judges and insufficient funding is creating a resource crisis for the federal judiciary. In the district courts, the number of civil cases pending 3 years or more has risen significantly since 1990. While the ABA has long advocated for increased resources for the federal judiciary, the current state of affairs prompted our ABA president to take the unusual step of sending a communication last month to all 390,000 members of the American Bar Association to urge them to take action.

While we are here to support enactment of Senate Bill 1385, there are also several steps short of enactment of Senate Bill 1385 that Congress could take to help the judiciary maintain its excellence and serve the people in a timely and just manner.

First, Congress should establish new judgeships in the five district courts singled out by the Judicial Conference for immediate relief: the Eastern District of California, the District of Arizona, the Western District of Texas, the Eastern District of Texas, and the District of Delaware.

Second, Congress should convert the eight temporary judgeships into permanent judgeships or at least extend their temporary status for 10 years or more. Without reauthorization, all eight will lapse next year.

Third, Congress should take steps to assure that the judiciary has sufficient resources to handle new responsibilities resulting from enactment of legislation that expands federal court jurisdiction or is expected to substantially increase the workload of the federal courts.

Fourth, Congress should make the filling of judicial vacancies a priority and work with common purpose to reduce the longstanding 10-percent vacancy rate. As of September 8, there were 94 vacancies on the courts, 38 of which have been classified as judicial emergencies by the Administrative Office of the U.S. Courts. Filling these vacancies expeditiously would provide immediate and lasting relief to the courts.

And, finally, fifth, the ABA urges Congress to protect the federal judiciary from future deficit reduction and to increase funding for Fiscal Year 2014 to the Senate Appropriations Committee's recommended funding level of $6.67 billion.

Finally, I would like to note with regard to the vacancy issues, there are presently pending 45 nominations—34 pending in Committee, 11 pending on the Senate floor.

Thank you for the opportunity to express the views of the American Bar Association on issues so central to our mission.

[The prepared statement of Mr. Reed appears as a submission for the record.]

Chairman COONS. Thank you.

We will now beginning rounds of questioning. Mr. Reed, if I might start with you, I certainly agree, as a number of witnesses have suggested, that we can and should do more to fill the existing vacancies, and I have worked diligently with my colleagues to make sure that we are getting nominees both to the White House potential candidates and the nominees to the Committee and then to the floor. But as you know, we have other challenges in getting things moved through the floor.

Let me step back, Mr. Reed, and ask sort of a most basic question. Why should the average citizen care about judicial staffing levels?

Mr. REED. Well, we have three branches of Government, as the Senator knows, and the judicial branch performs the important function of adjudicating controversies that are within federal jurisdiction. A vital function of Government is the fair and effective and timely resolution of disputes—patent disputes, business disputes, civil rights disputes, employment discrimination disputes, the wide range of disputes that fall within federal jurisdiction. So it matters to the public—this is a service that Government provides—and it matters to the public when that service is not provided in a timely, fair, and effective manner. It is a bread-and-butter issue for the public, I think.

Chairman COONS. I agree, and I hope many of my colleagues will agree as well.

Judge Tymkovich, in the past there have been some challenges, some criticism regarding the Conference's methodology for evaluating a district's request for additional judgeships. Would you briefly describe the process that the Judicial Conference undertakes when gathering data and when compiling its biannual Article III judgeship recommendation?

Judge TYMKOVICH. Thank you, Senator. The process really is a comprehensive and exhaustive process. It is something that we do every 2 years, and I have been on my committee for 6 years now, so this is the third time that we have updated and refreshed our recommendations to Congress.

The process, of course, starts with the courts that assess their needs and make a request to the Subcommittee on Judicial Statistics. Those courts look at their case filings, they look at factors internal to the court, they look at trends and make a request to the Committee that a new judgeship be considered.

The Subcommittee does not take that request at face value. We do additional work in analyzing the workload of that court. We look at their case filings, their weighted filings, pursuant to our process. We look at the assistance those courts have from other jurisdictions or within a circuit or within a district. Can judges visit from other circuits? What is their allocation of senior judges? Can senior judges assist? And what allocation of workload do they undertake? What is their use and numbers of magistrate judges that can assist the district judges? So we look at those factors on assistance.

Then we look at the unusual factors dealing with case complexity in a particular district, so in Delaware, they have an extremely high weighted caseload because of the complexity of the patent cases that they tend to see. So we look at that as a part of the overall assessment of whether there is a need for new judgeships.

Next we look at the geography. Is it a widespread district or, you know, a circuit with far-flung offices or divisions? That affects the delivery of judges to courthouses within those courts.

And then, finally, we look at case trends. Has there been a spike for some reason that is exogenous to the court? Or does it look like there is a trend, either upward or downward, that we should pay attention to?

So the Subcommittee evaluates all those factors and then makes a recommendation back to the court whether we agree or disagree with their initial recommendation. The court evaluates that at the Circuit judicial counsel level, then makes a recommendation back to the Subcommittee. That is step four of our process. We then do a final review, and we either agree or disagree. And we do disagree. We recommended that positions not be created or positions not be filled. This last set of recommendations, for example, had three or four additional judgeship requests that were not recommended by the Conference because the JRC did not approve the requests from the courts.

So, finally, that process goes to the full Judicial Resources Committee, then it goes to the Judicial Conference for approval, then over to Congress.

Chairman COONS. Are you confident that that methodology takes into account both the in-court and out-of-court responsibilities of a judge, looks at all the different areas in which judicial focus and competence——

Judge TYMKOVICH. Yes, it is a holistic overview, and if I could comment on the GAO study, the case-weighting methodology is just one part of the multi-step process that I have indicated. The GAO has made the criticism, as Senator Sessions made, in 2003. Our FJC, the Federal Judicial Center, and an academic evaluated our methodology, and we respectfully disagree with GAO's criticism of our study.

In fact, the GAO recommends that we go back to more of a time-based study, which we had in an earlier case-weighting methodology in the 1990s. Well, we have compared our current methodology with the time study, and it turns out that there is really not a material difference in the weighted outcomes that are a result of those two studies. In fact, the timing study had slightly higher case weightings than the current study we use. So we are quite confident that our methodology yields accurate results.

And I might add, the judiciary is not asking for the creation of judgeships in marginal courts. If you look at the recommendations, the district courts in our recommendations are way above our 430 national average. It is in the 600s. So we are not talking about marginal courts. We are talking about very busy courts. Only two circuit courts have asked for additional judges, and the averages in those circuit courts are well over 700 compared to our 500 case filings per panel per year. So we are talking about busy courts that really have a demonstrated need.

Chairman COONS. Thank you very much, Your Honor.

Senator Sessions.

Senator SESSIONS. Thank you.

Well, my thought is that the courts are able today to handle more cases than they have been able to do in the past and that some of those numbers should be changed. I am not sure that you should not listen to GAO. We insist that agencies of the Government, including the Department of Defense, listen to GAO's suggestions. And I am not aware that the court has made a formal evaluation of their recommendations.

But, for example, my concern would go to the authorized district judgeships according to—well, weighted case filings per authorized judgeship was 430; adjusted filings for a three-judge court of appeals panel were 500. They are the same as they were 20 years ago. Is that not right, Judge Tymkovich?

Judge TYMKOVICH. They were modified in the—I think we adjusted them in the early 2000s.

Senator SESSIONS. Where are you now?

Judge TYMKOVICH. We are at 430 after accounting for additional requested judgeships. Previous to that it had been at 400, and the Conference made that change in the early 2000s.

Senator SESSIONS. Not a lot. Looking at the numbers, the court of appeals, 10 percent of their cases now, a little over, are immigration cases, which seem to me rather simple cases compared to a complex patent case that has been tried for weeks. Civil appeals since 1991 have risen only 8 percent. Criminal cases are up by 33 percent since 1991. But we have had—that is appeals. And the most dramatic increase in civil appeals was prisoner appeals. Those have increased by 37 percent.

But as the law has matured and prisoner appeals in immigration cases, it would seem to me that those cases would take a smaller percentage of time of the appellate judges, Judge Tymkovich, than maybe they did in 1991.

Judge TYMKOVICH. Well, certainly, Senator, we have had an explosion in immigration cases. Overall since 1990, our caseload is up 15,000 cases in the appellate courts, and as I mentioned in my statement, we have had no additional circuit court judges. So we are doing our best to leverage a substantial increase in caseload through some of the techniques I have mentioned. But, you know, frankly——

Senator SESSIONS. Well, you are doing better. You have got more clerks. You have got better——

Judge TYMKOVICH. We do.

Senator SESSIONS [continuing]. Clerks in the clerk's office. You have got more computers. You have got the ability to research cases quicker with computer systems than having to pull down books and make copies of them as they used to do. So there is a lot of progress, which I give the courts credit for. I would just note that the Eleventh Circuit has the highest caseload per judge in the country, and they do not want any more judges. They are getting by, and they work hard, and they are proud of their productivity, and other circuits, too.

Now, with regard to the district courts, Judge Robinson, the 1,100 cases, giving you the highest caseload in the country, does in-

clude a factor that gives you credit for the more complex cases. Is that correct? And do you think that gives you enough credit?

Judge ROBINSON. I have no idea whether it does or not because these are such complex cases, and it is hard to quantify the contemplation and the investigation you have to spend, understanding the technology in the first instance, before you even get to the legal issues that the parties present to you in the second instance.

Senator SESSIONS. It sounded like that to me, but in addition to that, these have huge economic impacts on the country sometimes, do they not?

Judge ROBINSON. They do indeed.

Senator SESSIONS. You really have to give them a lot of time, and they are complex. I just wanted to recognize that. However, I would note that Social Security cases, you have—most courts have clerks that specialize in that.

Judge ROBINSON. We do not as a small court, and they are important cases, and we——

Senator SESSIONS. Do you have a habeas specialist?

Judge ROBINSON. We have one habeas and one pro se clerk who does most——

Senator SESSIONS. And that is criminal—prisoner appeals, and those have increased significantly, even after our reform law. But many of those just simply do not meet the legal standards and are dismissed promptly because they do not, with or without opinions.

Judge Tymkovich, my time is running out, but the recent bills to add judges have proposed increased filing fees to pay for the new judges, to try to stay within budget or not adding to the debt. I would just add it still violates the Budget Act and would be subject to a budget point of order because you are spending more than we agreed to spend. And you are saying, "But that is okay, I have raised taxes." But we really ought to ask the question, if we are going to raise taxes or fees, in your case, if we raise fees on criminal filings, maybe we should spend the money on something else rather than just adding judges.

But does the Judicial Conference support the raising of filing fees for additional judgeships to pay for it?

Judge TYMKOVICH. Senator, that is a really difficult question, and we have endorsed the bankruptcy bill, which did increase some filing fees. But we have very strong concerns about increasing fees. We are really not a revenue-generating branch of Government. We only have limited areas where we can do that. So for the most part the Conference does not support raising filing fees to solve our problem, nor would it be an adequate approach. And I think there are collateral consequences to that—the access to the courts and the like.

We do not have the opportunity to cancel programs. Our workload is filing driven. We react to the caseload, and we do not have a chance to take some other steps that other areas of Government do. So, in short, we have very grave concerns about these fees getting too high.

Senator SESSIONS. Well, I can understand that, and it is a difficult choice. You do not want to get it so expensive that a person cannot have their day in court.

Will we have a second round?

Chairman COONS. Absolutely.

Judge Robinson, if I might, I would just like to explore a little bit further how the District Court of Delaware has been able to meet steadily swelling caseloads, which now have hit record levels despite flat judicial staffing, and the impact of sequestration, as referenced by Mr. Reed and others, on the staff support. I think Senator Sessions correctly notes that since 1990 there have been significant advances in terms of computer resources, modernization, automation, and clerks. But in the last year, sequestration has cut back on many of those advantages by reducing staffing from underneath judges.

What have you been doing to deal with the caseload steadily going upward since you have gone to the bench? And what are the limits on the courts' ability to adapt as we go forward?

Judge ROBINSON. Well, I believe the District of Delaware has had a reputation dating back to the late 1990s when the patent caseload started to increase, my colleagues, like Joe Farnan and Rob McKelvey, with those, of being innovative in terms of managing our complex litigation, including the introduction of time to trials, separating or bifurcating issues, and encouraging litigants to choose representative claims and defenses.

We have a small court. We have not yet adopted rules. Therefore, we allow the judges to experiment with different case management techniques and choose those that are most consistent with their experience and with their strengths and weaknesses as jurists.

The only way that I manage to keep up is to have an excellent staff, to keep up with the paper and the cases, to prioritize, and the real limit is time. Setting a trial date as a trial judge is the one thing you can do to keep the parties focused on resolving the dispute, through mediation, through motion practice, or ultimately through trial. There is almost—I am double and triple booked with patent trials through 2015. There is only so much that one—and that does not include the incidental other civil trials that will come up or the criminal trials I have to accommodate. There is only so much time that we have. You can only do that by timing your trials and giving the parties limited opportunities to present their case through trial.

So to some extent, despite all the additional technologies we have and an excellent staff, there is almost nothing more that I can do at this point with respect to getting my cases resolved timely.

Chairman COONS. Thank you, Your Honor. And in your years of service, which are almost exactly the same period since the last comprehensive judgeship bill, and during those 23 years the workload has steadily increased, and you have seen some very capable judges come and go, some of the members of our bench that you referenced.

How do you see the increasing caseload impacting judicial morale and the ability of the federal bench to attract the best and brightest? And, Judge Tymkovich, I would also welcome your response to that. Judge Robinson?

Judge ROBINSON. My father was a pilot, and I grew up around airports, and I see my job as an air traffic controller. And I see an unending line of airplanes in the flight pattern waiting for their touch-and-go in Delaware on the way to Washington to the Federal

Circuit, to tell you the truth. And when you have this complex, burdensome process that you do over and over and over again, with dwindling resources and certainly nobody patting you on the back, the best you can do is get an affirmance by a Federal Circuit, generally on different reasoning than the ones you have given them, it does get——

[Laughter.]

Chairman COONS. Duly noted, Your Honor.

Judge ROBINSON. Right. It gets difficult to feel as though what you are doing makes a difference. And I love my job, but—and I almost feel sorry for the judges who are just coming on. At least I have grown with this increasing caseload. To be handed it first thing has got to be difficult.

Chairman COONS. As a member of the Committee who also chairs confirmation hearings for judicial nominees and has had a number of classmates and colleagues now come before this Committee, I am struck by what I think is their likely trajectory in terms of caseload and the financial challenges that every federal function faces.

Judge Tymkovich, if you might briefly just also speak to the challenges in terms of retaining and recruiting the best and brightest of the American Bar to be willing to serve as part of the federal bench.

Judge TYMKOVICH. Senator, it is a great honor to serve as a federal judge, but as the Chair of a program committee that has budget responsibilities, the last few years have been real challenges. I think the federal judiciary has been a leader in cost containment efforts. As Judge Gibbons testified, we have avoided costs of close to $1 billion by some of the steps we have taken dealing with our rent and our personnel costs over the last 3 years. But that cannot continue. We are down 1,100 employees since 2011. At the sequestration levels, we might have to lay off another 2,100 employees out of a 22,000 employee work force over the next couple years.

So these are serious times, and those issues, that lack of support has a real effect on the judiciary. And I think, you know, it is a dedicated and really high esprit de corps institution. I am proud of my colleagues, but it has become a very difficult time for us.

Chairman COONS. Well, I am grateful for your public service, both of you. I was really moved by Judge Roth's tireless dedication to her work and by how thorough a judge she was and by how attentive she was to every detail. Her mastery of the record really was something that encouraged me to go on and consider public service.

Judge TYMKOVICH. She was one of our best.

Chairman COONS. I just want to thank you both for your testimony today.

Senator Sessions.

Senator SESSIONS. I knew Judge Roth, too. She was remarkable.

Let me ask you this: Mr. Tymkovich, in 2006, the number of appeals filed per circuit fell through 2012. There were 8,024 appeals, and in 2012 there were 6,714. That is an over 10-percent decline in the number of appeals—excuse me. That is not correct. That is one circuit's numbers. But it does appear, does it not, that you in recent years have not seen a significant increase in the number of

appeals? Let us see. Well, almost all of these circuits. I am looking at—every circuit seems to have had a decline. Every circuit has had a decline, I believe I can say with confidence.

So since 2006, you were getting by in 2006. Why can't you get by today?

Judge TYMKOVICH. Thank you, Senator. I think I understand the gist of the question, and I think it really demonstrates the essential conservatism of the requests that we make to the Senate. For example, 2 years ago, our appellate request was, I think, around nine circuit judges. This time it is only six; it is only in two circuits. And even the request in the Ninth Circuit is less than it was the last go-round.

We also asked for a temporary judgeship instead of a permanent judgeship, recognizing the fact that if there are fluctuations in workload, that is one way for the Senate to accommodate that. So I think that we have reacted to changing caseloads.

Senator SESSIONS. Well, the appeals have gone down since 2006, it seems quite clear.

Mr. Sekulow, you raised something and you have said openly what a lot of us have thought about but have not really discussed. If we add 91 judges, should one President get to appoint all those judges? And by putting it past the election, at least the American people sort of are on notice that the next President is going to appoint a bunch of federal judges.

Mr. SEKULOW. Senator Sessions, the current plan in the bill basically doubles the number of vacancies pending before the entire judiciary. Doubles that number. That would authorize the current President to increase in this particular bill 91 additional judges. And what is interesting that Judge Tymkovich said, three of which his committee, the Judicial Committee, did not ask for. That is about $3,300,000 worth of expenditures. So to put it into a perspective of doubling the number of vacancies, in every Presidential election, no matter Republican or Democrat, there is always a discussion of the number of vacancies and how many were confirmed: and we always compare the confirmation process numbers versus the previous administration. And generally, if you look at the history, it is running about the same: the percentage of confirmations is pretty close. The fact is this doubles—one President doubles—under one Presidential administration doubles the number of vacancies, which then becomes a political tool as far as percentages go: but also, it looks like—I mean, if you were just to talk to the American people about this—it looks like court packing. I am not saying that is the intent. I am certainly not trying to disparage the Committee here or the people who are testifying today. I have tremendous respect for the federal courts and these judges. But the number of vacancies doubles under one Presidential administration.

There is a way to handle that. It could be staggered. You could do it a third, a third, a third, over 12 years. You could put the whole thing off for another——

Senator SESSIONS. Thank you for sharing that, and we have never discussed that, to my knowledge, openly. But I think that is a realistic thought.

Looking at the district court filings, Judge Robinson, in many areas there is a decline. You have an increase in immigration, I think as was noted. But many of those cases are handled quickly and are not the kind of big trials that a patent case or a bank fraud case would be.

Just looking at the data, in 2007, this area increased. Property offenses were 12,208. They went up to 13,340 in 2011. But others are different. Embezzlement, 591 in 2007; 552 in 2011—a drop there. Fraud cases went up from 7,700 to 9,300. But financial institution fraud, big cases there were 679 in 2007 and only 570 in 2012. Social Security cases were 699 in 2007, 527 in 2011. Forgeries and counterfeiting dropped from 868 to 737. Drug offenses dropped from 17,194 to 16,109. Firearms cases—I have raised this in hearings, and they are always talking about new laws, new laws, new laws on firearms. But the basic firearm case prosecutions are down. There were 8,480 cases in 2007, 7,183 in 2012. Explosives cases, 178 to 160, and it goes on. Overwhelmingly, the trend is downward, it seems to me.

So I guess what I am raising with you and just sharing with you is a concern that it does not appear we have had a real increase since 2007 in our caseload, appellate or district court. And our responsibility, therefore, should be to find those districts that are particularly burdened and see if we can provide help for them. But I am not sure, if we were getting by in 2007, why the judiciary cannot get by in 2013. I will let you all comment as you will.

Judge ROBINSON. I have found in my experience that every court is different, how they manage their resources and the kind of caseload they have. It is difficult for me to comment on general statistics when our court is so very different than so many of the courts.

I go back to the fact that so long as the parties bring to bear huge resources in the complex cases and the judiciary's resources remain the same or diminish that we will always be at a disadvantage and we will never be able to process the cases as well as we would like to.

Senator SESSIONS. That is kind of where I am wrestling with the numbers, and it is hard to know precisely what to do. But the courts are doing better. But mediation—I mean, it is incredible the number of—percentage of cases, civil cases, that end in settlements without a trial. And I give the judiciary credit for that. And the number of guilty pleas that occur in criminal cases is like 98 percent. Very few of the criminal cases are going to trial either. Do either of you have the numbers—and trials were higher in 1991. The percentage of trials were higher in 1991. And so if you have got a multi-week patent case, a multi-week bank fraud case that is disposed of by a guilty plea, that is really a relief to a district court bench.

Judge ROBINSON. Settlement and pleas are always welcome. That gives you more time to read, and you do not generally take appeals from settlements and pleas. So that is always a good thing for a trial judge.

Senator SESSIONS. But judges do have to spend time to help bring about settlements.

Judge ROBINSON. They do indeed, and I go back to the fact that setting the trial date in the first place in civil cases is instrumental

in keeping the parties focused on the case and trying to resolve it, because most parties do not want to go to trial because there are risks involved with any trial. And when you have got a full calendar of trials and have to slip in those criminal cases that do go to trial—and there are many. I have had more, I think, the last couple years than I have had in a while. It just makes it difficult to manage.

Chairman COONS. If I might, Judge Robinson——

Senator SESSIONS. Thank you for allowing me to go over.

Chairman COONS. Certainly, Senator.

If I might just follow up on that, you made in your opening statement a reference to the fact that in one district there is a 4-year delay before civil trials. Is it possible also that one of the reasons you are seeing more settlements is because of the enormous delay until there is going to be a trial? If there were more judges available, do you think there might be more time to reflect on particularly complex cases and to reach a more thorough, a more reasoned decision? And in your view, does an overburdened docket have unintended consequences that hurt litigants? Just a general series of questions.

Judge ROBINSON. Well, it is interesting because when you are talking about complex civil cases, defense counsel does not want to get to trial, plaintiff's counsel does. So there is always that conflict between who is perhaps putting roadblocks in the way to a resolution.

I believe that it is important for us as a—it is important for the judiciary to move the parties toward resolution. An amicable resolution is always best. But I believe there is great truth in justice delayed is justice denied. And when we cannot get to motions that are dispositive, if we cannot get the parties to trial, I believe it just leads to more mischief and increasing costs, because the parties will take up the time doing something that is not really, I think, important.

Chairman COONS. Well, to the opening question I asked Mr. Reed, I think the reason the average citizen should be concerned about increasingly lengthy delays for the consideration of either criminal or civil cases is the reason our federal judicial system exists is for the resolution of wrongs and for controversies. And when they are so delayed, justice is at some risk of being denied.

Judge Tymkovich, if I might ask just one question. One of the concerns I have heard some colleagues raise is that the Judicial Conference's methodology is sort of a one-way ratchet that leads to continually increasing staffing levels in busy courts, while courts with decreasing caseloads are allowed to remain at constant levels. Is there any process that aligns incentives in a way that would actually lead to more rigorously examining districts and circuits where federal resources might be conserved through either the elimination or the realignment of unneeded judges?

Judge TYMKOVICH. Thank you, Senator. Really two comments to that.

The first is that as a part of our process, the Judicial Resources Committee really does a rigorous examination of the need for filling a particular judgeship or adding to the number of judges in a circuit. And we have a process within the Judicial Conference where

we can recommend to the Conference that a vacant judgeship need not be filled because of declining caseloads or circumstances pertinent to a particular district. In the last decade, we have had a number of recommendations to the Conference that it do so, six over the last couple of cycles for our recommendation.

So we do have a process where we would leave a vacancy unfilled and make that recommendation to the Conference and to the Senate.

We do not recommend the elimination of judgeships. I think this process illustrates how difficult it is to create new judgeships, so the position of the Conference is that it is better to leave a judgeship unfilled when cases go down rather than have to go through the exercise of creating a new district. But we do have a process that I think accommodates changing caseloads, and we have been sensitive to those districts where there have been declines and have addressed it in that way.

Chairman COONS. Mr. Sekulow, if I might, you advocated for filling those existing vacancies as a first step for addressing the ongoing needs that have been identified by all of you and in this broader conversation. But delay on the floor remains a problem, and getting agreement by Senators of different parties or the party opposite the President has been a challenge.

Delay on the floor in the 3 years that I have been a Senator has been an abiding and a persistent challenge. What advice would you give to Leader Reid if he cannot get a time agreement to move nominees who have cleared this Committee, often by an overwhelmingly positive vote?

Mr. SEKULOW. I think this is a problem that transcends different sessions of the Senate. This has been an ongoing problem, and it was a problem under the President when President Bush was in office that preceded the same problem with President Clinton.

I will note that yesterday two district court nominees were confirmed by the Senate, last night. So I think the process has to be streamlined. We have said this publicly in other venues, in fact, before Senate committees. I think the problem is the contentious nature of the process itself. I think a lot of this is process issues. I think what Judge Tymkovich is dealing with on the court of appeals level, what Judge Robinson is dealing with in her district court are process issues. And I think the process issue—the Senate is not immune from a process problem.

That does not mean that it is going to always be smooth sailing. There will be nominees who are controversial. But at the end of the day, our position has always been the President, when he is elected by the American people, has the right to nominate those federal judges. That is his right of appointment. Then it is up to the Senate for advice and consent. That process—and we have said this previously—needs to be less cantankerous, to be quite frank. And that, as I said, transcends—I am not focusing on one session of the Senate. This has been an ongoing problem. I saw it firsthand.

I would ask this question: Why is it that the Eleventh Circuit Court of Appeals, talking about process, has not asked for additional judges? What is it about their process that has enabled them to succeed with a very high workload per judge? And why is it that if we have other federal courts, whether it is district courts or

courts of appeals, where the docket is a shrinking docket, then rather than just preserving judges for preserving judges' sake—or vacancies—or lifetime appointments, why do we not start looking at that empirical data to try to get that kind of process? I think that affects both the administration of justice, which we are all concerned about, as well as finding out the facts. What is the process there that is working well? And why isn't that being implemented in other courts?

Chairman COONS. A fair question, and Senator Sessions took some interest in your testimony, as did I, that you raise a concern that the Federal Judgeship Act of 2013 would become effective immediately, that all of the judgeships created would become effective immediately rather than either staggering them or having them become effective after the next election.

Would you have a similar objection to legislation that reduces the size of a court immediately upon enactment?

Mr. SEKULOW. Well, I think, again, staggering it is going to remove partisan politics from it. It is not just the timing, which is a huge part of it. It is the number. It is 91 judges. There are 91 vacancies—or 92 vacancies as of last night, and we are talking about increasing 91—we are putting 91 additional vacancies on top of that. I think that it looks like court packing. I am not trying, again, to impugn anybody's intent. But that is just what it looks like. So staggering the process, if, in fact, it is justified to increase it, and the country has the budget to do this, I think that solves the problem.

But, again, I think with a lot of this, you have to look at process here, Senator.

Chairman COONS. Thank you, Mr. Sekulow.

Judge Tymkovich, I am going to give you the last word, if I might. First, if you would just speak to the question of timing, you know, I rely heavily on the advice of the Judicial Conference because I view it as a nonpartisan methodology that is detailed and thorough and that examines those districts, those circuits that have a request, that have a demonstrated need, and it does not simply look at filings. It looks at lots of different indicia of where judges are straining to meet their caseload in a full and appropriate and effective way for legitimate reasons.

I would be interested also—we spoke at a number of points today in this hearing about how patent cases, which are a particularly significant portion of the Delaware District Court's caseload, are complex, unusually complex and sort of hard to weight because of that. The D.C. Circuit has also been the subject of some discussion.

My understanding is that the Judicial Conference does not evaluate either the Federal Circuit to which those patent trials are appealed or the D.C. Circuit because the staffing model applied to other courts does not work in some ways. Could you just speak to that question as well?

Judge TYMKOVICH. Thank you, Senator. Several questions there.

First, as to the timing, the process that the Judicial Resources Committee and the Judicial Conference uses is a nonpartisan, biennial process. We do not look at who is President and who is in the Senate. What we do is look at aligning our workload and our judgeships to that increasing or declining workload. So our process really

is independent of any of the political considerations, and we strive very hard to maintain that objectivity. Regardless of who the President is, we come forward with what our recommendation is based on our workload and our assessment of it.

As to our case weighting, certainly patent cases are one of our five heaviest weighted civil cases. They really garner substantial weight in our process. Only some very other complex administrative or death penalty-related matters have that kind of case weighting.

As you indicated in your question, the D.C. Court of Appeals has been excluded from the pure numerical standard. We have employed a different process with that court because of the uniqueness of their caseload. They have a heavy administrative appeals practice. They have something like 40 administrative appeals per judgeship panel versus about 28 or fewer in the other court of appeals. So, historically those types of cases have driven a more complex and difficult evaluation. Those cases have multiple parties, typically issues of first impression, big records, things that make them somewhat outliers to some of the other cases we see in the other circuits. Some of those cases are exclusive jurisdiction in the D.C. Court. So for that reason, we have excluded them from the same process of other circuits.

I might add they have not asked for a new judgeship in the last 20-plus years or so. They have lost one to transfer, and their caseload has been relatively steady the last 10 years or so. So we have not seen any reason to re-evaluate that because their caseload is about where it was 10 years ago.

Chairman COONS. Thank you, Your Honor. In my own view, the D.C. Circuit and the Federal Circuit work under a particularly complex and burdensome caseload not because of the number of cases but their complexity, and so unresolved questions about filling judicial vacancies on those circuits has occupied a fair amount of the debate of my colleagues and the members of this Committee. So I appreciate your giving us some input on the methodology that you use, and I appreciate being reminded that the D.C. Circuit has not requested additional judgeships.

Any further questions, Senator Sessions?

Senator SESSIONS. Mr. Reed, I just noticed, I have raised twice with the FBI Director the failure to prosecute bankruptcy fraud. When I was United States Attorney, I felt like that was federal court, and the only people in the world were the FBI and the federal prosecutors to prosecute it. In 2007, there were only 95 bankruptcy fraud cases in America. It dropped to 64 in 2011. But that is really not the judge's fault. That is the fault of the prosecutors and the FBI. That is an important court system in America involving lots of money, and frequently there are abuses that occur, and judges do not like to see fraud occur in their court.

I would note relevant to the vacancies and failures to confirm nominees, I think at least half of the vacancies that exist today there is no nomination for that vacancy. I think more than half. And the amount of time necessary to confirm a judge is consistent or shorter than that that occurred in previous times. That is not to say we should not move faster. President Obama nominated a fine judge from the Northern District of Alabama, and we moved

it out of Committee within a week or two, and so it is on the floor now and should come up rather soon. So I do not know that—I think it is a right—there is a right to be concerned about the slow pace in not filling nominees, but I guess the blame goes around.

And, finally, I did review the number of appeals filed per circuit from 2002 through 2012, and I just looked at the 2006 number through 2012. Every single circuit has had a decline in filings during that time. The Second Circuit, it looks like about a 20-percent decline. And I would say, Mr. Tymkovich, the Federal Circuit, we are going to be given—providing some information, Mr. Chairman, on that. They have often said that our cases are more complex and more important. The D.C. Circuit has made the same argument. But real examination of those two circuits will show they have a very low workload compared to other circuits, and I think both of those should give up judgeships and let us send them to places overworked like any rational business would do.

Thank you, Mr. Chairman.

Mr. REED. Senator, you had made the point earlier about the improvements in technology that have helped the courts become efficient, and my understanding is—I just wanted to make the point that my understanding is that one of the perverse consequences of the sequestration process is that, in order to move funds around, they have had to defer investing in technology and maintaining technology with the possible consequence that in the future some of those efficiencies will be lost. So I just wanted to make that point.

Senator SESSIONS. A valuable point.

Chairman COONS. Thank you, Mr. Reed, Mr. Sekulow, Judge Robinson, and Judge Tymkovich. As you have observed, sequestration is having quite negative consequences all across the Federal Government. We are finding that although we may be reducing spending in the short term, it is having long-term consequences in terms of personnel, efficiency of operations, and our ability to execute on our public responsibilities. The federal judiciary is a whole branch of our constitutional order, yet we spend less than 1 percent of the total federal budget on its operation. And as Judge Tymkovich observed at the outset, you do not control your caseload. You are the branch that responds to actions taken, enforcement actions by federal law enforcement, plaintiffs who come to you. You are not in control of the filings, and our challenge is to work I think responsibly with you to find a path forward that allows us to fill the vacancies that we have, to ensure that judgeships are created in those districts and circuits that are burdened, and to review closely those where there might be some need for realignment. But in my view, this needs to be done in a nonpartisan way and in a way that continues to sustain the American judicial system as literally the world leader, the gold standard for the adjudication of conflicts.

If there are no more questions, I would like to thank all four of our witnesses on behalf of the Subcommittee on Bankruptcy and the Courts for your testimony and to thank the many interested stakeholders who have submitted testimony for the record.

With that, this hearing—excuse me. I will leave the record open for 1 week for members who were not able to join us today and who

may wish to submit additional testimony on the topic, and I look forward to continuing to work with my colleagues to resolve the issues raised today.

With that, we are hereby adjourned. Thank you.

[Whereupon, at 11:58 a.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

UPDATED Witness List

Hearing before the
Senate Committee on the Judiciary
Subcommittee on Bankruptcy and the Courts

On

"Federal Judgeship Act of 2013"

Tuesday, September 10, 2013
Dirksen Senate Office Building, Room 226
10:30 a.m.

The Honorable Timothy Tymkovich
U.S. Circuit Judge, Tenth Circuit Court of Appeals
Chair, Standing Committee on Judicial Resources, Judicial Conference of the U.S.
Denver, CO

The Honorable Sue Robinson
U.S. District Judge
District of Delaware
Wilmington, DE

Jay Sekulow
Chief Counsel
American Center for Law and Justice
Washington, DC

Michael Reed
Chair, Standing Committee on Federal Judicial Improvements,
American Bar Association
Partner, Pepper Hamilton LLP
Philadelphia, PA

PREPARED STATEMENT OF HON. CHRISTOPHER A. COONS

U.S. SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE *on* BANKRUPTCY *and* THE COURTS

FOR IMMEDIATE RELEASE: September 10, 2013
CONTACT: Ian Koski at 202-224-5042 or Ian_Koski@coons.senate.gov

Opening Statement of Senator Coons

Senate Judiciary Subcommittee on Bankruptcy and the Courts hearing on
Federal Judgeship Act of 2013
- As Prepared for Delivery on September 10, 2013 -

Good afternoon and please come to order. Welcome to this hearing of the Judiciary Committee Subcommittee on Bankruptcy and the Courts.

America's federal courts serve as a model for courts around the world. For a variety of factors, our federal judiciary is without equal. Presidential appointment and lifetime tenure insulate judges from political influence. Senate advice and consent helps guarantee minimum competence and is itself strengthened by the work of key institutional players, such as the American Bar Association, which publishes non-partisan opinions as to the qualifications of nominees. And, fortunately, a federal judicial appointment carries with it sufficient prestige to lure away many talented nominees who could earn more money in the private sector or in academic work.

It is because of the quality of our judiciary that John Adams' vision that the United States be "a government of laws and not men" still holds true today. It is the role of the judiciary to determine each case according to the law, not according to popularity, political influence or money. It is the federal judiciary that protects the least of us against abuse of our civil rights and liberties, whether by the government or another private party.

We must not, however, take our federal judiciary for granted. As Chief Justice Roberts noted in his 2010 year end report on the judiciary, "the judiciary depends not only on funding, but on its judges, to carry out [its] mission." Unfilled vacancies have led judges in many districts to be "burdened with extraordinary caseloads."

So, too, does insufficient statutory authorization for judgeships burden our courts.

Judges on the Eastern District of California, however, which has long been recognized as one of the most overburdened in the nation, would still face over 1000 weighted case filings per judge even if the vacancy on that court were filled immediately. In the District of Delaware, judges face weighted filings of over 1500 per judge and there are no vacancies left to fill on that court. As a point of reference, the Judicial Conference generally believes that additional judicial resources are necessary when weighted filings begin to approach 500 per judgeship.

Senior judges, who are eligible for their pensions but agree to forego lucrative outside employment opportunities and continue to hear cases, help fill the gap. But senior judges are in effect providing charity to our government out of commitment to public service and to their colleagues—they cannot be the foundation of a responsible staffing model.

Overburdened judges, almost by definition, cannot provide the level of time and care that they would like to dedicate to each case before them. Moreover, and especially in a time of stagnant judicial compensation, they reduce the esprit de corps of the judiciary and make it marginally more difficult to attract the best and the brightest to serve.

Congress has not comprehensively addressed judicial staffing levels since 1990, 23 years ago. Over that time, caseloads have risen 38% and authorized staffing levels have risen by just 4%. Put another way, trial court weighted filings per judgeship have risen to 520 from 386 in 1991. Those national figures mask the dire circumstances faced by the most burdened districts, such as the Eastern District of Texas and, as I have mentioned before, the District of Delaware and the Eastern District of California.

That is why Senator Leahy and I have introduced the Federal Judgeship Act of 2013. This bill is based on the recommendations of the nonpartisan Judicial Conference of the United States, which is led by Chief Justice of the United States John Roberts. It would create six new judgeships in two courts of appeals and 85 new judgeships in 29 district courts.

This bill would provide much-needed relief to our overburdened courts, ensuring that they are better prepared to administer justice quickly and efficiently. Increasing the number judgeships will help cases move more quickly, reduce uncertainty that prevents businesses from creating jobs, and permit every American who has been wronged to get his or her day in court.

I look forward to the testimony today to shed greater light on the judiciary's need for additional resources, and what it would be forced to do if Congress continues to neglect its duty to responsibly ensure that the federal bench is adequately provided for.

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PREPARED STATEMENT OF HON. PATRICK LEAHY

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
On the Federal Judgeship Act of 2013
September 10, 2013

Today the Judiciary Committee's Subcommittee on Bankruptcy and the Courts holds a hearing to evaluate the judgeship needs of Federal courts across the country. I thank Chairman Coons for his work on this long-overdue legislation and for holding this important hearing.

The last time Congress passed a comprehensive judgeships bill was 1990, when 85 new judgeships were created. Once those new judgeships were added, there were 295,000 Americans per Federal judge. Today there are 362,000 Americans per Federal judge, because our population has grown by almost 70 million in the past 23 years. In July, I joined with Senator Coons to introduce S. 1385, The Federal Judgeship Act of 2013, which is an important step to help our Federal courts meet the increased caseload burdens that come with a larger population. It would also help reduce the current burden on our Federal courts if the Senate would move more quickly to fill the 92 existing Article III judicial vacancies, especially the 9 for which the Judiciary Committee has already reported nominees.

The Coons-Leahy bill reflects the current judgeship recommendations of the Judicial Conference of the United States, whose presiding officer is Chief Justice John Roberts. The Judicial Conference submits these recommendations to Congress every two years, after conducting a comprehensive review of the workload needs in Federal district and appellate courts. The recommendations can include both additional judgeships and requests that an existing or future vacancy not be filled if the Judicial Conference determines that there is a greater need to focus limited resources in courts with higher caseloads. This bill is a serious effort to meet the demands on our Federal courts from a growing population.

I hope Senators from both sides of the aisle support the Coons-Leahy bill. It does not benefit anyone if litigants have their cases delayed for months and months because our Federal courts are understaffed. When an injured plaintiff sues to help cover the cost of his or her medical expenses, or when two small business owners disagree over a contract, they should not have to wait years for a court to resolve their dispute. Americans are rightfully proud of our legal system and its promise of access to justice and speedy trials. This promise is embedded in our Constitution. When overburdened courts make it hard to keep this promise, the Senate should work in a bipartisan manner to help. The Senate has done just that in previous years.

Senator Hatch was a cosponsor of a similar bill that I introduced in 2008 that would have created 66 new judgeships. I have supported judgeship bills during both Republican and Democratic administrations, including those that became law during the Jimmy Carter, Ronald Reagan, and George H.W. Bush administrations. The Coons-Leahy bill, like those that became law in 1978, 1984, and 1990, would promote the rule of law that individuals and businesses, large and small, depend on.

While I would prefer that this hearing, and the Senate's efforts, focus on what should be the nonpartisan matter of making sure the Federal Judiciary has the resources it needs, I have also

authorized this hearing to allow the Republican Senators who have introduced another bill, S. 699, the Court Efficiency Act of 2013—which would strip the D.C. Circuit of 3 of its 11 judgeships—to make their case. I see this judgeship stripping legislation as a hyper-partisan effort whose sole basis, unfortunately, is the long-standing Republican effort to ensure that only Republican presidents are permitted to have their nominees confirmed to that court. Their bill, if enacted into law, would take effect immediately rather than after the next Presidential election, with the aim of denying President Obama the opportunity to have his nominees to the D.C. Circuit confirmed—an opportunity the sponsors of S. 699 did not seek to deny President Bush.

Of the last 19 judges confirmed to the D.C. Circuit, 15 were nominated by Republican presidents while just 4 were nominated by Democratic presidents.

In 1984, Senate Republicans had no problem voting to create a twelfth seat on the D.C. Circuit, and then voting to confirm President Reagan's and President George H.W. Bush's nominees to that seat. However, when Bill Clinton, a Democratic president, nominated Merrick Garland to the twelfth seat, Senate Republicans suddenly "realized" that the twelfth seat was unnecessary and should not be filled. Republican Senators held a hearing in 1995 to make their new-found argument.

In 1997, after two years of needless delay, Judge Garland was ultimately confirmed to the eleventh seat on the D.C. Circuit. When President Clinton made two more nominations to the D.C. Circuit, Senate Republicans did not even allow the nominees a hearing. They blocked and pocket-filibustered outstanding nominees, not because of caseload data or hearing testimony, but just because they could.

In 2002, following the confirmation of John Roberts to the D.C. Circuit, the court's caseload, measured by pending appeals per active judge, was reduced to its lowest level in the past 20 years. Nonetheless, the Senate proceeded to confirm three additional nominees to the D.C. Circuit: Janice Rogers Brown, Thomas Griffith and Brett Kavanaugh. These nominees filled the tenth, eleventh, and, again, the tenth seats. Not a single Senate Republican raised any concern about whether those judges were truly needed. They were a Republican president's nominees, so apparently that question was not relevant.

Now that it is a Democratic president making nominations to those same seats, Senate Republicans have dusted off their old arguments against filling vacancies on the D.C. Circuit. They say one thing when President Clinton is in office, flip when the President is a Republican, and flop when the American people elect President Obama. Instead of opposing President Obama's nominees to the D.C. Circuit on their individual merit, some Senate Republicans are attempting to simply eliminate three of the D.C. Circuit's judgeships with the introduction of S. 699. Congress already acted in 2008 to move the twelfth seat on the D.C. Circuit to the Ninth Circuit through an amendment sponsored by Senator Kyl and Senator Feinstein. This Republican bill, S. 699, would eliminate one Federal judgeship altogether, while moving one to the Second Circuit and another to the Eleventh Circuit, even though neither circuit has actually requested additional judgeships. This would reduce the D.C. Circuit to only eight judgeships.

It is disappointing that all eight Republican Senators on this Committee are supporters of this judgeship stripping bill, even though they have voted a combined 42 times to confirm Republican presidents' nominees to the same seats they now seek to remove.

I hope that we can lay aside this misguided effort and focus on meeting the actual needs of our Federal courts. The Federal Judgeships Act of 2013 is based on the serious recommendations of the Judicial Conference and would create much-needed judgeships across the country. I appreciate Senator Coons' leadership on this bill, and I hope that more Senators will work with us to ensure that our courts are able to provide speedy justice to all Americans.

I thank the witnesses for appearing before the Committee today, and I look forward to their testimony.

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PREPARED STATEMENT OF HON. TIMOTHY M. TYMKOVICH

STATEMENT OF HONORABLE TIMOTHY M. TYMKOVICH
CHAIR, COMMITTEE ON JUDICIAL RESOURCES OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
BEFORE THE SUBCOMMITTEE ON
BANKRUPTCY AND THE COURTS
OF THE
COMMITTEE ON THE JUDICIARY OF THE
UNITED STATES SENATE

September 10, 2013

Chairman Coons, Ranking Member Sessions and members of the subcommittee, I am Timothy Tymkovich, Circuit Judge for the Tenth Circuit Court of Appeals and Chair of the Judicial Conference Committee on Judicial Resources, and I appreciate your invitation to appear today to discuss the Article III judgeship needs of the Federal Judiciary.

The Judicial Resources Committee of the Judicial Conference of the United States is responsible for all issues involving human resource administration, including the need for Article III judges and support staff in the U.S. courts of appeals and district courts. My testimony today has two purposes: to provide information about (1) the judgeship needs of the district and appellate courts, and (2) the process by which the Judicial Conference determines those needs.

It has been over two decades since Congress passed a comprehensive judgeship bill. In that 1990 legislation, Congress created 85 additional judgeships reflecting an 11% increase in total authorized Article III judgeships. As I will discuss later, Congress has

also provided some relief in district courts with exceptional needs, primarily along the border, in the late 1990s and early 2000s.

But caseloads have continued to rise. To enable the Judiciary to continue serving litigants efficiently and effectively, the judicial workforce must be expanded. I would therefore like to thank Senator Coons and Senator Leahy for introducing S. 1385, the Federal Judgeship Act of 2013, which reflects all of the Judicial Conference's Article III judgeship recommendations transmitted to Congress earlier this year. While the Judicial Conference feels strongly that each of these judgeship recommendations is justified due to the growing workload in these courts, it is cognizant of the current economic realities and the prospective cost associated with the proposal. It therefore acknowledges that it may not be possible for all of these judgeships to be authorized in a single legislative vehicle and that prioritization within the recommendations may be necessary.

Every other year, the Conference conducts a survey of the judgeship needs of the U.S. courts of appeals and U.S. district courts. The latest survey was completed in March 2013. Consistent with the findings of that survey and the deliberations of my Committee, the Conference recommended that Congress establish 91 new judgeships in the courts of appeals and district courts. The Conference also recommended that eight existing temporary district court judgeships be converted to permanent status. Appendix 1 contains the specific recommendation as to each court. All of the judgeships recommended by the Conference would be authorized by S. 1385. For many of the

courts, the recommendations reflect needs that have existed since the last omnibus judgeship bill was enacted in 1990.

Survey Process

In developing these recommendations, the Judicial Conference (through its committee structure) uses a formal process to review and evaluate Article III judgeship needs. The Committee on Judicial Resources and its Subcommittee on Judicial Statistics conduct these reviews, but the Conference makes the final recommendations on judgeship needs. Before a judgeship recommendation is transmitted to Congress, it undergoes careful consideration and review at six levels within the Judiciary, beginning with the judges of the particular court making a request. If the court does not make a request, the Conference does not consider recommending a judgeship for that court. Next, the Subcommittee on Judicial Statistics conducts a preliminary review of the request and either affirms the court's request or offers its own reduced recommendation, based on the court's workload and other stated contributing factors. Once this review is complete, the Subcommittee's recommendation and the court's initial request are forwarded to the judicial council of the circuit in which the court is located.

Upon completion of the council's review, the Subcommittee on Judicial Statistics conducts a further and final review of the request and/or recommendation, reconciling any differences that may still exist. The Subcommittee then submits the recommendation to the full Committee on Judicial Resources. Finally, the Judicial Conference considers

the full Committee's final product. In the course of the 2013 survey, the courts requested 94 additional judgeships, permanent and temporary. Our review procedure reduced the number of recommended additional judgeships to 91.

During each judgeship survey, requests from courts recommended for additional judgeships in the previous survey (two years prior) are re-considered, taking into account such factors as the most current caseload data, relevant trends and changes in the availability of judicial resources. In some instances, this review prompts adjustments to previous recommendations.

Judicial Conference Standards

The recommendations developed through the review process described above (and in more detail in Appendix 2) are based in large part on a numerical caseload standard. These standards are not by themselves fully indicative of each court's needs. They represent the caseload at which the Conference begins to consider requests for additional judgeships – the starting point in the process, not the end point.

Caseload statistics must be considered and weighed with other court-specific information to arrive at a sound measurement of each court's judgeship needs. Circumstances that are unique, transitory, or ambiguous are carefully considered so as not to result in an overstatement or understatement of actual burdens. The Conference process therefore takes into account additional factors, including:

- the number of senior judges available to a specific court, their ages, and levels of activity;
- available magistrate judge assistance;
- geographical factors, such as the size of the district or circuit and the number of places of holding court;
- unusual caseload complexity;
- temporary or prolonged caseload increases or decreases;
- the use of visiting judges; and
- any other factors noted by individual courts (or identified by the Statistics Subcommittee) as having an impact on the need for additional judicial resources. (For example, the presence of high profile financial fraud and bribery prosecutions, the number of multiple defendant cases, and the need to use court interpreters in a high percentage of criminal proceedings).

Courts requesting additional judgeships are specifically asked about their efforts to make use of all available resources including their use of senior and magistrate judges, intercircuit and intracircuit assignment of judges to provide short-term relief, and alternative dispute resolution.

District Court Analysis

Reviewing the judgeship needs of the district courts, the Conference, after accounting for the additional judgeship(s) requested by the court, initially applies a

standard of 430 weighted filings per judgeship to gauge the impact on the district. Weighted filings statistics account for the different amounts of time district judges require to resolve various types of criminal and civil cases. Applying this standard to the current recommendations, the workload exceeds 500 weighted filings per judgeship in 28 of the 32 district courts in which the Conference is recommending either an additional judgeship or conversion of an existing temporary judgeship to permanent status; 17 courts exceeded 600 weighted filings per judgeship.

Appellate Court Analysis

In the courts of appeals, the Conference, again after accounting for the additional judgeship(s) requested by the circuit court, uses a standard of 500 adjusted filings per panel as its starting point. Adjusted filings are calculated by removing reopened appeals and counting original pro se appeals as one-third of a case. In each appellate court in which the Conference is recommending additional judgeships, the caseload levels substantially exceed the standard, averaging over 700 adjusted filings per panel. Other factors bearing on workload have been closely considered as well. For example, the circuits' individual rules regarding how cases are designated for oral argument affect the percentage of cases that receive oral argument in each circuit, which also impacts the workload.

In short, caseload statistics furnish the threshold for consideration, but the process entails a critical scrutiny of the caseloads in light of many other considerations and variables, all of which are considered together.

Caseload Information

National data provide general information about the changing volume of the courts' business. Since the last comprehensive judgeship bill for Article III courts was enacted in 1990, case filings have risen significantly. From fiscal year 1991 to fiscal year 2012 filings in the district courts have risen 39 percent, with civil filings increasing by 32 percent and criminal felony defendants by 67 percent. Between 1999 and 2002, Congress created 34 additional judgeships in the district courts in response to particular problems in certain districts. Even with these additional resources, however, the number of weighted filings per judgeship nationwide in district courts has reached 520--clearly well above the Judicial Conference standard for considering additional judgeships.

Over the same time, court of appeals filings have grown by 34 percent, but, unlike the district courts, no judgeships have been added to the courts of appeals since 1990. As a result, the national average caseload per three-judge panel has reached 1,033. Were it not for the assistance provided by senior and visiting judges, the appellate courts would not have been able to keep pace.

The judgeship needs of a particular court, however, require a more focused analysis of court-specific data. Indeed, in districts where the Conference has recommended additional judgeship resources, the need is much more dramatic compared to the national figures. As stated previously, there are 28 district courts with caseloads exceeding 500 per judgeship, and more than half of these courts have caseloads in excess

of 600 per judgeship. Overall, the average weighted filings for courts needing additional judgeships is 628, far exceeding the Conference standard of 430 for additional judgeships. Appendix 3 provides a more detailed description of the most significant changes in the caseload since 1990.

The lack of additional judgeships combined with the growth in caseload has created enormous difficulties for many courts across the nation, but it has reached urgent levels in five district courts that are struggling with extraordinarily high workloads, with 700 or more weighted filings per authorized judgeship, averaged over a three-year period. The severity of conditions in the Eastern District of California, the Eastern District of Texas, the Western District of Texas, the District of Arizona, and the District of Delaware requires immediate action. The Conference urges Congress to establish new judgeships in those districts as soon as possible.

The Conference is also extremely concerned about the eight existing temporary judgeships which have been recommended for conversion to permanent status. All eight of these judgeships will lapse before the end of fiscal year 2014, and without re-authorization, these on-board resources will be lost, further damaging the Federal Judiciary by diminishing already scarce judicial resources in these districts.

The Conference appreciates the efforts that the Senate, and in particular this Committee, has made to authorize some of these critically needed judgeships. Specifically, the Conference supports all of the judgeships included in S. 744, the Border Enforcement, Economic Opportunity, and Immigration Reform Act, passed by the Senate earlier this year. That bill would authorize eight new district court judgeships and convert two temporary district court judgeships to permanent status in Southwest border districts

where the caseload, already at extraordinarily high levels, would be further impacted by the bill's immigration enforcement measures.

Conclusion

Over the last 20 years, the Judicial Conference has developed, adjusted, and refined the process for evaluating and recommending judgeship needs in response to both judiciary and congressional concerns. The Conference does not recommend, or wish, indefinite growth in the number of judges. It recognizes that growth in the Judiciary must be carefully limited to the number of new judgeships that are necessary to exercise federal court jurisdiction.[1] The Conference attempts to balance the need to control growth and the need to seek resources that are appropriate to the Judiciary's caseload. In an effort to implement that policy, we have requested far fewer judgeships than the caseload increases and other factors would suggest are now required. Furthermore, the Conference, mindful of the dire fiscal realities that our federal government is currently facing, acknowledges the possibility that not all of the requested judgeships may be created and that some prioritization may have to occur.

Again, the Judicial Conference of the United States is grateful for the introduction of S. 1385, the Federal Judgeship Act of 2013, which reflects the Article III judgeship recommendations of the Judicial Conference of the United States. Thank you for the opportunity to appear today and for your continued support of the Federal Judiciary. I would be happy to answer any questions the Subcommittee may have.

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[1]JCUS-SEP 93, p.51; JCUS-SEP 95, p.44.

Appendix 1

TABLE 1. ADDITIONAL JUDGESHIPS OR CONVERSION OF EXISTING JUDGESHIPS RECOMMENDED BY THE JUDICIAL CONFERENCE
2013

CIRCUIT/DISTRICT	AUTHORIZED JUDGESHIPS	JUDICIAL CONFERENCE RECOMMENDATION	ADJUSTED FILINGS PER PANEL/WEIGHTED FILINGS PER AUTHORIZED JUDGESHIP
U.S. COURTS OF APPEALS		**5P, 1T**	ADJUSTED FILINGS
NINTH	29	4P, 1T	843
SIXTH	16	1P	593
U.S. DISTRICT COURTS		**65P, 20T, 8T/P**	WEIGHTED FILINGS
DELAWARE	4	1P	1,165
CALIFORNIA, EASTERN	6	6P, 1T	1,132
TEXAS, EASTERN	8	2P, T/P	1,042
TEXAS, WESTERN	13	4P, 1T	752
ARIZONA	13	6P, 4T, T/P	712
CALIFORNIA, CENTRAL	28	10P, 2T, T/P	691
CALIFORNIA, NORTHERN	14	5P, 1T	675
COLORADO	7	2P	663
WASHINGTON, WESTERN	7	2P	660
INDIANA, SOUTHERN	5	1P	642
FLORIDA, SOUTHERN	18	3P, T/P	639
FLORIDA, MIDDLE	15	5P, 1T	634
NEW YORK, WESTERN	4	1P	626
FLORIDA, NORTHERN	4	1P	619
WISCONSIN, WESTERN	2	1P	613
ALABAMA, NORTHERN	8	T/P	613
CALIFORNIA, SOUTHERN	13	3P, 1T	602
NEW YORK, EASTERN	15	2P	596
NEW JERSEY	17	2P, 1T	587
IDAHO	2	1P	577
TEXAS, SOUTHERN	19	2P	568
MINNESOTA	7	1P, 1T	556
MISSOURI, WESTERN	6	1T	553
GEORGIA, NORTHERN	11	1P, 1T	552
NEVADA	7	1P, 1T	547
OREGON	6	1T	533
NEW MEXICO	7	1P, T/P	527
NEW YORK, SOUTHERN	28	1P, 1T	525
TENNESSEE, MIDDLE	4	1T	497
VIRGINIA, EASTERN	11	1T	472
KANSAS*	6	T/P	471
MISSOURI, EASTERN	8	T/P	424

P = PERMANENT; T = TEMPORARY; T/P = TEMPORARY MADE PERMANENT

* If the temporary judgeship lapses, the recommendation is amended to one additional permanent judgeship.

Appendix 2

JUDGESHIP RECOMMENDATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

JUDICIAL CONFERENCE PROCESS

In developing judgeship recommendations for consideration by Congress, the Judicial Conference, through its committee structure, uses a formal survey process to review and evaluate Article III judgeship needs, regularly and systematically. The nationwide surveys of judgeship needs are based on established criteria related to the workload of the judicial officers. These reviews are conducted biennially by the Committee on Judicial Resources (Committee), with final recommendations on judgeship needs approved by the Judicial Conference.

The recommendations are based on justifications submitted by each court, the recommendations of the judicial councils of the circuits, and an evaluation of the requests by the Committee using the most recent caseload data. During each judgeship survey, the Judicial Conference reconsiders prior, but still pending, recommendations based on more recent caseload data and makes adjustments for any court where the workload no longer supports the need for additional judgeships. The Judicial Conference has also implemented a process for evaluating situations where it may be appropriate to recommend that certain positions in district courts be eliminated or left vacant when the workload does not support a continuing need for the judicial officer resource.

In general, the survey process is very similar for both the courts of appeals and the district courts. First, the courts submit a detailed justification to the Committee's Subcommittee on Judicial Statistics (Subcommittee). The Subcommittee reviews and evaluates the request and prepares a preliminary recommendation which is given to the courts and the appropriate circuit judicial councils for their recommendations. More recent caseload data are used to evaluate responses from the judicial council and the court, if a response is submitted, as well as to prepare recommendations for approval by the Committee. The Committee's recommendations are then provided to the Judicial Conference for final approval.

COURT OF APPEALS REVIEWS

At its September 1996 meeting, on the recommendation of the Judicial Resources Committee, which consulted with the chief circuit judges, the Judicial Conference unanimously approved a new judgeship survey process for the courts of appeals. Because of the unique nature of each of the courts of appeals, the Judicial Conference process involves consideration of local circumstances that may have an impact on judgeship needs. In developing recommendations for courts of appeals, the Committee on Judicial Resources takes the following general approach:

A. Courts are asked to submit requests for additional judgeships provided that at least a majority of the active members of the court have approved submission of the request; no recommendations for additional judgeships are made without a request from a majority of the members of the court.

B. Each court requesting additional judgeships is asked to provide a complete justification for the request, including the potential impact on its own court and the district courts within the circuit of not getting the additional judgeships. In any instance in which a court's request cannot be supported through the standards noted below, the court is requested to provide supporting justification as to why the standard should not apply to its request.

C. The Committee considers various factors in evaluating judgeship requests, including a statistical guide based on a standard of 500 filings (with removal of reinstated cases) per panel and with pro se appeals weighted as one third of a case. This caseload level is used only as a guideline and not used to determine the number of additional judgeships to recommend. The Committee **does not** attempt to bring each court in line with this standard.

The process allows for discretion to consider any special circumstances applicable to specific courts and recognizes that court culture and court opinion are important ingredients in any process of evaluation. The opinion of a court as to the appropriate number of judgeships, especially the maximum number, plays a vital role in the evaluation process, and there is recognition of the need for flexibility to organize work in a manner which best suits the culture of the court and satisfies the needs of the region served.

DISTRICT COURT REVIEWS

In an ongoing effort to control growth, in 1993, the Judicial Conference adopted new, more conservative criteria to evaluate requests for additional district judgeships, including an increase in the benchmark caseload standard from 400 to 430 weighted cases per judgeship. Although numerous factors are considered in looking at requests for additional judgeships, the primary factor for evaluating the need for additional district judgeships is the level of weighted filings. Specifically, the Committee uses a case weighting system[1] designed to measure judicial caseload, along with a variety of other factors, to assess judgeship needs. The Judicial Conference and its Committee review all available information on the workload of the courts and supporting material provided by the individual courts and judicial councils of the circuits. The Committee takes the following approach in developing recommendations for additional district judgeships:

A. In 2004, the Subcommittee amended the starting point for considering requests from current weighted filings above 430 per judgeship to weighted filings in excess of 430 per judgeship *with the additional judgeships requested.* For courts with fewer than five authorized judgeships, the addition of a judgeship would often reduce the caseload per judgeship substantially below the 430 level. Thus, for small courts the 430 per judgeship standard was replaced with a standard of current weighted filings above 500 per judgeship. These caseload levels are used only as a guideline and a factor to determine the number of additional judgeships to recommend. The Committee **does not** attempt to bring each court in line with this standard.

B. The caseload of the individual courts is reviewed to determine if there are any factors present that create a temporary situation that would not provide justification for additional judgeships. Other factors are also considered that would make a court's situation unique and provide support either for or against a recommendation for additional judgeships.

C. The Committee reviews the requesting court's use of resources and other strategies for handling judicial workload, including a careful review of each court's use of senior judges, magistrate judges, and alternative dispute resolution, in addition to a review of each court's use of and willingness to use visiting judges. These factors and geographic considerations are used in conjunction with the caseload information to decide if additional judgeships are appropriate, and to arrive at the number of additional judgeships to recommend for each court.

D. The Committee recommends temporary judgeships in all situations where the caseload level justifying additional judgeships occurred only in the most recent years, or when the addition of a judgeship would place a court's caseload close to the guideline of 430

[1] "Weighted filings" is a mathematical adjustment of filings, based on the nature of cases and the expected amount of judge time required for disposition. For example, in the weighted filings system for district courts, each civil antitrust case is counted as 3.45 cases while each homicide defendant is counted as 1.99 weighted cases. The weighting factors were updated by the Federal Judicial Center in June 2004 based on criminal defendants and civil cases closed in calendar year 2002.

weighted filings per judgeship. The Committee also recommends at least a portion of additional judgeships as temporary when recommending a large number of additional judgeships for a particular court. In some instances the Committee also considers the pending caseload per judgeship as an additional factor supporting an additional temporary judgeship.

Appendix 3

CASELOAD CHANGES SINCE LAST JUDGESHIP BILL

A total of 34 additional district court judgeships have been created since 1991, but six temporary judgeships have lapsed. These changes have resulted in a four percent increase in the overall number of authorized district court judgeships; court of appeals judgeships have not increased. Since the last comprehensive judgeship bill was enacted for the U.S. courts of appeals and district courts, the numbers of cases filed in those courts have grown by 34 percent and 39 percent, respectively. Specific categories of cases have seen dramatic changes over the past two decades. Following is a summary of the most significant changes.

U.S. COURTS OF APPEALS *(Change in authorized judgeships: 0)*

- The total number of appeals filed has grown by 34 percent, nearly 15,000 cases, since 1991.
- Appeals of criminal cases have increased 33 percent since 1991.
- The most dramatic growth in criminal appeals has been in immigration appeals, which increased from 145 in 1991 to 1,616 in 2012.
- Appeals of decisions in civil cases from the district courts have risen eight percent since 1991.
- The most dramatic growth in civil appeals has been in prisoner appeals where case filings are up 37 percent since 1991.
- Appeals involving administrative agency decisions have fluctuated over the years, but have nearly tripled, growing from 2,859 in 1991 to 8,391 in 2012. The increases resulted primarily from appeals of decisions by the Board of Immigration Appeals, with the largest increases occurring in the Second and Ninth Circuits.
- Original proceedings have grown from 609 in 1991 to 4,265 in 2012, partially as a result of the Antiterrorism and Effective Death Penalty Act which requires prisoners to seek permission from courts of appeals for certain petitions. Although enacted in April 1996, data for these and certain pro se mandamus proceedings were not reported until October 1998.

U.S. DISTRICT COURTS *(Change in authorized judgeships: +4%)*

- Total filings have grown by over 100,000 cases, a 39 percent increase since 1991.
- The civil caseload has fluctuated over the last 21 years, but has increased 32 percent overall since 1991.

- The most dramatic growth in civil filings occurred in cases related to personal injury product liability which have grown from 10,952 filings in 1991 to 43,083 in 2012, due to a large number of asbestos filings and an increase in multi-district litigation cases.
- Civil rights filings increased steadily after the Civil Rights Act of 1990 was enacted. Although cases have declined from their peak in 1997, the number of civil rights filings was 90 percent above the 1991 level.
- Protected property rights cases more than doubled between 1991 and 2012. Trademark, patent, and copyright filings all showed growth since 1991, although the largest increase occurred in patent filings, which more than quadrupled.
- The number of social security cases filed in 2012 rose to more than twice the number filed in 1991.
- Prisoner petitions increased 26 percent between 1991 and 2012, due to significantly higher numbers of motions to vacate sentence filings and habeas corpus petitions.
- Fair Debt Collection Practices Act cases were first categorized separately in 2008. These filings increased from 4,239 in 2008 to 9,320 cases in 2012.
- Foreclosure filings nearly quadrupled between 2008 and 2012, reversing a steady decline between 1991 and 2008.

- The number of criminal felony defendants has increased 67 percent since 1991.
  - The largest increase, by far, has been in immigration offenses which rose from 2,448 in 1991 to 25,184 in 2012.
  - Defendants charged with firearms offenses more than doubled between 1991 and 2012, an increase of over 4,500 cases.
  - The number of drug-related defendants in 2012 was 26 percent above the number filed in 1991.
  - The number of fraud defendants fluctuated between 1991and 2012, but remained 24 percent above the number filed in 1991.
  - Defendants charged with drug, immigration, firearms, and fraud offenses comprised 85 percent of all felony defendants in 2012.
  - Sex offense defendants nearly doubled between 2005 and 2012.

PREPARED STATEMENT OF HON. SUE L. ROBINSON

STATEMENT OF

THE HONORABLE SUE L. ROBINSON

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

BEFORE THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON BANKRUPTCY AND THE COURTS
UNITED STATES SENATE

"Federal Judgeship Act of 2013"

September 10, 2013

Good morning, Senator Coons, Ranking Member Sessions, and Members of the Committee.

On behalf of the United States District Court for the District of Delaware, I thank you for the opportunity to appear before the Committee today to share with you some information about the Court in relation to the Federal Judgeship Act of 2013.

Let me start my remarks with a bit of history written by the Honorable Jane R. Roth for the book *The Delaware Bar in the Twentieth Century*, published by The Delaware State Bar Association in 1994: "On September 30, 1789, President George Washington appointed Gunning Bedford, Jr., a signer of the constitution and Delaware's attorney general, as the first judge of the United States District Court for the District of Delaware. After the first case was tried in November of 1789, there was not another case until May of 1792. The main business of the court was admiralty cases."[1]

Clearly times have changed. Although we still hear admiralty cases from time to time, we no longer display a model ship above the bench when we do so, and admiralty cases comprise less than 1% of our civil docket. Today, the main business of the Court is patent litigation, with patent cases now comprising over 50% of our civil docket. And it is the exponential growth in the number of patent cases filed in the District of Delaware that has led to the recognition of our judgeship needs by the Judicial Conference.

Before I talk about how our patent caseload is affecting members of the Court

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[1] *The Delaware Bar in the Twentieth Century* (1994, The Delaware State Bar Association) at 505.

and the public it serves, let me step back if I may to better illustrate just how unique our docket is. The District of Delaware has had four judges since 1985. In the year 1991, when I first came on the bench, 37 patent cases were filed in the District of Delaware, about nine cases per judge. At that time, even nine cases was not an insignificant number of patent cases per judge. With the exception of one year, since 2000, the District of Delaware has been among the top five districts in the country in terms of number of patent cases filed, and has had more patent cases per judgeship than any other district. More specifically, as of August 31, 2013, there have been 1,394 patent cases filed in the District of Delaware so far in fiscal year 2013. The patent filings per authorized judgeship using completed fiscal year 2012 was 202 patent filings per judge. You can see how that number compares to the other high volume courts in the graphs that have been submitted with my statement. In terms of the statistic that the Judicial Conference of the United States uses to justify the authorization of an additional judgeship, the current national standard of weighted filings per judgeship is 500 cases. The District of Delaware has 1,812 weighted filings per judgeship, exceeding the national standard by several times.

But it is more than the sheer number of cases that makes our need for the fifth judgeship such a compelling one. Whether you characterize the magnitude of the caseload pre-AIA or post-AIA,[2] the complexity of the mechanics to resolve these cases is the same. In other words, whether you have ten defendants in one case, or ten cases each with a single defendant, the defendants often start the litigation by filing motions to dismiss - for lack of personal jurisdiction or for failure to state a claim - rather than an answer. Once these motions have been resolved and a scheduling order entered, the parties are supposed to exchange relevant information through discovery. This part of the process is subject to the most abuse by the bar, and requires the close supervision of the Court to balance the relevance of the information sought against the burden of production. Given the sheer volume of production, a discovery dispute may involve the court's review of thousands of pages of documents.

When the parties have completed fact and expert discovery, the next steps in a patent case typically include claim construction - a requirement unlike any found in other civil cases - and the submission of summary judgment motions. If there are issues left to be tried at the conclusion of the motion practice, you as a judge still have to decide motions in limine (or the equivalent thereof) and conduct the bench or jury trial with the evidentiary disputes that inevitably arise during trial. Your final responsibility is to review the dispute yet again post-trial through motions for a new trial or renewed motions for judgment as a matter of law. Just when you think you have fulfilled your responsibility as a trial judge, the case is appealed to the Federal Circuit, which may remand the case for further proceedings.

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[2]Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (to be codified at 35 U.S.C. §§ 311-319).

In Delaware, the judges go through this process over and over again, always with the overlay of technology inherent in patent litigation, whether you are dealing with chemical patents, software patents, or medical device patents. Clearly, the mechanics of a patent case are complex and burdensome, and the Court's resources to manage the case will never equal the resources of the parties to litigate the case.

I'd like to share just a few statistics to exemplify the work associated with ushering a patent case to trial, and the disproportionate resources available to the Court. In fiscal year 2012 in connection with its patent docket, the judges of the Court were required to resolve 318 motions to dismiss and 132 motions for summary judgment, and conducted 56 claim construction hearings and 22 patent trials. To date in fiscal year 2013, the judges of the Court have conducted 175 claim construction hearings and 19 patent trials. In just one of my patent cases tried in this fiscal year - with a single plaintiff, a single defendant, and ten patents at issue - the parties filed 13 motions accompanied by 782 pages of briefing, over 8,500 pages of appendices, eight boxes of trial exhibits, and with at least 46 lawyers involved in the litigation. And, of course, you also have your criminal cases and the remainder of your civil docket to handle. Consequently, in any given month, a judge in our Court can expect to have scores of motions filed with thousands of pages of accompanying briefing.

For a judge like me, who has been on the bench for decades, who has ushered over 800 patent cases to closure and presided over almost 100 patent trials, I can't really quantify for you the work load associated with the case load. I can tell you that I'm double- and even triple-booked for patent trials through 2015, that I have 327 patent cases on my personal docket with 141 pending motions. I have two law clerks who assist me with my patent docket. We cannot keep this level of work up indefinitely and do our jobs well. Indeed, the statistics are starting to demonstrate a downward trend in terms of our ability, as a Court, to resolve motions and get to trial timely.

I take my responsibilities as a trial judge seriously, as do my colleagues. We have taken an oath to give every party in our court due process, whether the party is a corporation competing in the marketplace or a non-practicing entity (otherwise known as a patent owner) such as an affiliate whose task it is to monetize the corporation's intellectual property. Ensuring due process means giving every party a fair and reasonable opportunity to demonstrate the merits of its allegations. So long as the Patent & Trademark Office continues to issue patents that have the potential for impacting the market, there will continue to be business disputes over the metes and bounds of the monopolies associated with the patents. It is both a privilege and a weighty responsibility to help the parties resolve these disputes, but the Court cannot do so without sufficient resources.

Due process, not the numbers, is what is driving our request for a fifth judge.

Thank you for your kind attention.

PREPARED STATEMENT OF JAY ALAN SEKULOW

PREPARED ORAL TESTIMONY OF

Jay Alan Sekulow, J.D., Ph.D.

Chief Counsel, American Center for Law and Justice

United States Senate Committee on the Judiciary,

Bankruptcy and the Courts Subcommittee

September 10, 2013

Federal Judgeship Act of 2013

Chairman Coons, Ranking Member Sessions, and distinguished Members of the Subcommittee, on behalf of the American Center for Law and Justice and our global affiliates, thank you for allowing me to come before you to discuss the Federal Judgeship Act of 2013. As an officer of the court for more than 30 years now, and having had the opportunity to appear on 12 occasions before the Supreme Court of the United States, I have a deep respect for our federal judiciary, and I am honored to be before you today to share my views about how to best preserve the greatest legal system in the history of the world.

Many of my comments today reflect the views contained in a memo that we at the American Center for Law and Justice released in 2009 when Senator Leahy introduced the Federal Judgeship Act of 2009. I've submitted a copy of that memo for the record. While the bill before us today varies slightly from the 2009 bill in the quantity of new judgeships to be created and the courts on which they would be seated, the core structure is the same. There is no question that the Congress has a duty to ensure the existence of a federal judiciary that is properly

equipped to handle the caseload that is expected of it. This includes an obligation to ensure the proper number of judges, adequate funding, and as much independence from political influence as is reasonably possible. With these criteria in mind, the ACLJ agrees with members of this subcommittee on both sides of the aisle that Congress should create new judgeships when there is a clear and demonstrable need for them. However, even when there is justification for incurring the cost that is associated with creating these judgeships, it is imperative that Congress do so in a way that vigilantly guards the independence of the judiciary. As such, we recommend that this subcommittee take the following concerns into consideration as it debates the current legislation.

First, and most important, we are concerned that this legislation invokes an undue amount of partisan influence into the makeup of the federal judiciary. This concern is triggered by both the fact that there is not a delay in the effective date of this legislation and the structure of the temporary judgeships that are created under this Act.

Regarding the effective date, the ACLJ believes as a matter of sound principle that all new judgeships should come into effect after the next presidential election. This eliminates the temptation for members of Congress on both sides of the aisle to base their support on who currently resides in the White House. It also reduces the appearance to some that it is an effort to pack the courts.

Regarding the temporary judgeships created by this Act, the current construct of the legislation does not actually create any temporary judgeships, but rather creates several permanent judgeships to be filled by the current President, and then subsequently eliminates the authority of a future President to fill a vacancy on that same court sometime in the future. Again, similar to our concerns about the effective date, this construct injects too much partisan influence

into the process and should be modified to preserve the integrity of the judiciary and retain a proper amount of separation for members of this subcommittee and the Senate as a whole.

Next, while I indicated that the ACLJ supports the creation of new judgeships when there is a clear and demonstrable need, it is important that we do not fall prey to the suggestion that more is automatically better. There is a high cost associated with every new judgeship. The estimates I've seen are that it costs about $1 million a year for every new judgeship, which gives this bill for 91 new judgeships a 10-year cost of nearly $1 Billion. As stewards of the American taxpayer dollar, Congress must give this cost careful consideration. Further, there is a strong case to be made that it is often more effective to provide existing judges with additional resources than it is to create a new judgeship. In many cases, this produces better results at a lower cost.

Finally, it is prudent to consider that an ever-expanding court can lead to instability in the law. This occurs as members of a court interact with each other less frequently, and as litigants before the court deal with increasingly divergent opinions rendered by the court. Again, more is not always better, and while Congress has an obligation to ensure that enough judgeships exist -- and that they have proper resources, it also has an obligation to weigh the cost and to help the courts operate effectively and efficiently.

In conclusion, the ACLJ thanks this subcommittee for its dedication to our judiciary, and requests that careful consideration be given to these concerns in order to ensure that our taxpayer dollars are spent carefully, and in order to preserve the independent judiciary that all of us are rightfully proud of.

Thank you, Chairman Coons and Ranking Member Sessions. I am happy to answer your questions.

PREPARED STATEMENT OF MICHAEL H. REED

STATEMENT

of

MICHAEL H. REED

on behalf of the

AMERICAN BAR ASSOCIATION

before the

SUBCOMMITTEE ON BANKRUPTCY AND THE COURTS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

for the hearing

on

"FEDERAL JUDGESHIP ACT OF 2013"

September 10, 2013

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Mr. Chairman and Members:

My name is Michael H. Reed. I am a partner in the Philadelphia office of Pepper Hamilton LLP, and am the current Chair of the ABA Standing Committee on Federal Judicial Improvements. I am here today at the request of ABA President James R. Silkenat to express our support for S. 1385, the Federal Judgeship Act of 2013, which is based on the detailed assessment of judgeship needs of the federal judiciary released by the Judicial Conference of the United States this past March. We request that this statement be made part of the hearing record.

This long-overdue comprehensive judgeship bill would authorize 70 permanent and 21 temporary judgeships at the district and appellate court levels, and would convert eight existing temporary district court judgeships into permanent positions. In total, these new judgeships would increase the number of authorized Article III judges by 10 percent. We thank you for introducing S. 1385 on behalf of the judiciary and applaud you for holding this hearing, which will help highlight a growing problem that should concern every Member of Congress as much as it does the American Bar Association – insufficient resources are diminishing the ability of our federal courts to serve the people and deliver timely justice.

Adverse Effects of Insufficient Resources

Our judicial system is predicated upon the principles that each case deserves to be evaluated on its merits, that justice will be dispensed even-handedly, and that justice delayed is justice denied. While neither the Judicial Conference nor the ABA wants to encourage unnecessary growth in the size of the federal judiciary, the ability of our federal courts to live up to these principles is, in large part, dependent on our judges having manageable workloads.

When federal courts do not have sufficient judges to keep up with the workload, civil trial dockets take a back seat to criminal dockets due to the Speedy Trial Act. As a result, persistent judge shortages increase the length of time that civil litigants and businesses wait for their day in court, create pressures that "robotize" justice, and increase case backlogs that will perpetuate delays for years to come. This has real consequences for the financial well-being of communities and businesses and the personal lives of litigants whose cases must be heard by the federal

courts – e.g., cases involving challenges to the constitutionality of a law, unfair business practices under federal antitrust laws, patent infringement, police brutality, employment discrimination, and bankruptcy.

The negative consequences of too few judges have been exacerbated by the across-the-board budget cuts mandated by sequestration this fiscal year. Staff layoffs and furloughs and reductions in services and operating hours implemented in courts across the country in response to sequestration have made it even more difficult for courts with too few judges to keep up with caseloads and deliver timely justice.

The combination of too few judges and insufficient funding is creating a resource crisis for the federal judiciary. While the ABA has long advocated for increased resources for the federal judiciary, the current state of affairs prompted our ABA president to take the unusual step of sending a communication last month to all 390,000 members to urge them to take action.

S. 1385

S. 1385 proposes the creation of a sizable number of new judgeships because it, in effect, is a "catch-up" bill. The last comprehensive judgeship bill was enacted in 1990. In the intervening years, federal judicial caseloads have steadily and steeply increased, fueled in large part by congressional expansion of federal court jurisdiction and national drug and immigration policies that call for and fund enhanced law enforcement efforts. Starting in the 105th Congress, new judgeship bills, based on the Judicial Conference's analysis of need, were introduced regularly but failed to receive action in both chambers. Instead, Congress adopted a piecemeal approach, authorizing 34 additional district court judgeships in 1999, 2000, and 2002, while allowing a half dozen temporary judgeships in other districts expire. Consequently, over the past 23 years, district courts have experienced a 39 percent increase in filings but only a 4 percent increase in judgeships. Even more sobering, the number of appellate court judges has not changed, despite a 34 percent increase in filings since 1991.

The district courts in which the Judicial Conference is recommending additional judgeships currently are laboring under weighted case filings of almost 630 per authorized judgeship, far

above the 430 weighted caseload threshold that the Judicial Conference uses as a starting point for examining a district court's need for additional judgeships. If Congress created all of the judgeships requested, the weighted caseload of all authorized district court judgeships would still be in excess of 430 cases.

In some jurisdictions, the current caseloads are dramatically worse: judges of the District of Arizona and the Western District of Texas have caseloads that exceed 700 weighted filings, and judges in three districts – the Western District of Texas, the Eastern District of Texas, and the District of Delaware – labor to dispense timely justice with weighted caseloads of over 1,000 per judge. The litigants before these courts deserve better. We join the Judicial Conference in making an urgent plea to Congress to authorize a sufficient number of new judgeships in each of these five districts as soon as possible.

The need for more judgeships is just as evident in our courts of appeals, where the number of appeals filed annually has grown from approximately 41,000 in 1990 to close to 56,500 in March 2013.The Judicial Conference has limited its request to four permanent judgeships for the Ninth Circuit Court of Appeals and one permanent judgeship for the Sixth Circuit Court of Appeals.

Congressional Response to Judgeship Recommendations and the GAO Report on Methodology

Over the last decade, even though Members of Congress largely disregarded the Judicial Conference's requests for additional judgeships, they have respected the judiciary's funding needs during the appropriation process, requiring in return that the judiciary find ways to economize and contain growth. The judiciary has obliged and continues to aggressively seek ways to contain administrative costs, including recently implementing a new records retention policy that is expected to save $3 million annually once it is fully operational.[1] It also has implemented many new methods to handle caseload growth, including enhancing its use of time-saving and cost-effective technologies, developing and implementing innovative case-

[1]The Third Branch, *Reappraisal of Records Saving Millions for Judiciary*, 8/20/13, at: http://news.uscourts.gov/reappraisal-records-saving-millions-judiciary

management systems, and relying more heavily on senior judges, magistrate judges and staff attorneys.

We understand that some Members of Congress continue to believe that the judiciary is not trying hard enough. The ABA's practicing lawyers, on the other hand, are concerned that in seeking ways to compensate for insufficient "judge-power," courts may be forced to adopt time-saving judicial procedures, some of which may serve efficiency at the price of altering the delivery and quality of justice over time in ways not intended. We caution that utilization of more and more methods to dispose of cases as quickly as possible runs the grave risk of adversely affecting the quality of justice delivered by our federal courts.

We are aware that some Members of Congress also question the method by which weighted and adjusted case filings are determined and caseload minimums for considering the need for additional judgeships are set by the Judicial Conference. A review of documents dating back to 2003 reveals that the concerns of the Government Accountability Office (GAO) with regard to the validity of the methodology used to determine case weights has been a major factor of contention that likely has contributed to the failure to enact a comprehensive judgeship bill since 1990.[2] We urge the Judicial Conference and the GAO to collaborate and resolve this impasse so that the substantive needs of the U.S. courts can be met without further delay.

Recommendations to Restore Funding

Just as Congress has an obligation to oversee the courts, it likewise has an obligation to provide the judiciary with the resources it needs to carry out its constitutional and statutory duties. There are several steps, short of enactment of S. 1385, that Congress could take to help the judiciary maintain its excellence and serve the people in a timely and just manner:

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[2]Federal Judicial Center, 2003-2004 District Court Weighting Study (2005); S. Rpt. 110-427 and S. Hrg.110-457, Serial No. J-110-111(2008); Government Accountability Office, The General Accuracy of District and Appellate Judgeship Case-Related Workload Measures, Testimony before the Committee in the Judiciary, GAO-03-937T (2003); Government Accountability Office, The General Accuracy of District and Appellate Judgeship Case-Related Workload Measures, Testimony before the Committee in the Judiciary,GAO-08-928T (2008);Government Accountability Office, The General Accuracy of District and Appellate Judgeship Case-Related Workload Measures, Testimony before the Committee in the Judiciary, GAO-09-1050T(2009)

1. Congress should establish new judgeships in the five district courts singled out by the Judicial Conference for immediate relief -- the Central District of California, the District of Arizona, the Western District of Texas, the Eastern District of Texas, and the District of Delaware. The astronomically high caseloads under which they struggle are indisputable. Members of the Senate Financial Services and General Government Appropriations Committee acknowledged the severity of the conditions by including a provision in their FY 2014 appropriations bill to authorize new judgeships in each of the five districts.[3]

2. Congress should convert the eight temporary judgeships into permanent judgeships or at least extend their temporary status for ten years or more. To reiterate the Judicial Conference's concern, without reauthorization, all eight will lapse next year, further diminishing scarce judicial resources in these districts, and both the Senate and House Financial Services and General Services Appropriation bills contain provisions extending these judgeships.

3. Congress should consider the impact of legislation on the workload of the federal courts. Congress should take steps to assure that the judiciary has sufficient resources to handle new responsibilities resulting from enactment of legislation that expands federal court jurisdiction or is expected to substantially increase the workload of the federal courts. For example, Congress should take steps to assure that the judiciary has sufficient resources and manpower to fulfill its new responsibilities under S. 744, the Border Security, Economic Opportunity and Immigration Modernization Act, if enacted.

4. Congress should make the filling of judicial vacancies a priority and work with common purpose to reduce the long-standing 10 percent vacancy rate. Particular attention should be given to vacancies identified as judicial emergencies. This requires Senators to submit their recommendation to the White House in a timely manner and to avoid undue delay in scheduling up-or-down floor votes on nominees reported by the Judiciary Committee.

[3] See appendix.

The vacancy rate has lingered at or above 10 percent for most of the past four years. As of September 8, there are 94 vacancies on the courts, 38 of which have been classified as judicial emergencies by the Administrative Office of the U.S. Courts.[4] Filling these vacancies expeditiously would provide immediate and lasting relief to the courts.

5. When making budgeting decisions, Congress should take into consideration that the federal judiciary is essential to preserving constitutional democracy and freedom, and that waiting to restore funds until the erosion in the quality of justice becomes a *fait accompli* is not a viable national option. The ABA urges Congress to protect the federal judiciary from future deficit reduction and to increase funding for FY 2014 to the Senate Appropriations Committee's recommended funding level of $6.67 billion.

6. To better prepare for challenges facing the courts, we suggest that your subcommittee give consideration to holding hearings to explore creating structures that would facilitate cooperation and ongoing discussion of issues of mutual concern. The so-called "Williamsburg Conferences," convened annually from 1979 to 1994, and the Office of the Administration of Justice, operational within the Justice Department from 1977 to 1981 might provide valuable guideposts for such an endeavor.

Thank you for the opportunity to express the views of the ABA on issues so central to our mission.

[4] http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx:

Defending Liberty
Pursuing Justice

Appendix

NOTABLE LEGISLATIVE PROPOSALS THAT WOULD AUTHORIZE NEW ARTICLE III JUDGESHIPS

113TH CONGRESS

S. 1385, the Federal Judgeship Act of 2013, was introduced by Senators Chris Coons (D-DE) and Patrick Leahy (D-VT) on 7/30/13. This omnibus judgeship bill is based on the recommendations of the Judicial Conference of the United States.

S. 1371, the FY 2014 Financial Services and General Government Appropriations Act, was reported to the Senate on 7/25/13.

H.R. 2789, the FY 2014 Financial Services and General Government Appropriations Act, was reported to the House on 7/17/13.

S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act, was passed by the Senate on 6/27/13.

S. 699, Court Efficiency Act of 2013, was introduced by Senator Charles Grassley (R-IA) on 4/10/ 13.

Court of Appeals					
	S. 1385	**S. 1371**	**H.R. 2789**	**S. 744**	**S. 699**
Second Circuit					1P
Sixth Circuit	1P				
Ninth Circuit	4P, 1T				
Eleventh Circuit					1P
DC Circuit					–3P

District Courts					
	S. 1385	**S. 1371**	**H.R. 2789**	**S. 744**	**S. 699**
New York (Eastern)	2P				
New York (Southern)	1P, 1T				
New York (Western)	1P				
Delaware	1P	1P			
New Jersey	2P, 1T				
Virginia (Eastern)	1T				
Texas (Eastern)	2P, 1T/P	1T	1T		
Texas (Southern)	2P	1P		1P	

	S. 1385	S. 1371	H.R. 2789	S. 744	S. 699
Texas (Western)	4P, 1T	2P		2P	
Tennessee (Middle)	1T				
Indiana (Southern)	1P				
Wisconsin (Western)	1P				
Minnesota	1P, 1T	1P			
Missouri (Eastern)	1T/P	1T	1T		
Missouri (Western)	1T				
Arizona	6P, 4T, 1T/P	2P, 1T, 1T/P	1T	2P	
California (Northern)	5P, 1T				
California (Eastern)	6P, 1T	4P		3P	
California (Central)	10P, 2T, 1T/P	1T, 1T, 1T/P	1T		
California (Southern)	3P, 1T				
Hawaii		1T			
Idaho	1P				
Nevada	1P, 1T				
Oregon	1T				
Washington (Western)	2P				
Colorado	2P				
Kansas*	1T/P	1T	1T		
New Mexico	1P, 1T/P	1P, 1T, 1T/P	1T		
Alabama (Northern)	1T/P	1T	1T		
Florida (Northern)	1P				
Florida (Middle)	5P, 1T				
Florida (Southern)	3P, 1T/P	1T	1T		
Georgia (Northern)	1P, 1T				

"P" denotes permanent; "T" denotes temporary; "T/P" denotes conversion of temporary to permanent

* If the temporary judgeship in this district lapses, the Judicial Conference's recommendation would be amended to one additional permanent judgeship.

QUESTIONS SUBMITTED BY SENATOR COONS FOR TIMOTHY M. TYMKOVICH

"Federal Judgeship Act of 2013" Hearing
September 10th, 2013
Senator Coons Questions For Response

Judge Tymkovich:

1) During the hearing you briefly addressed some of the criticisms regarding the Conference's methodology used when evaluating a district's request for additional judgeships. Would you provide a more detailed response regarding how your committee assesses the need for judgeships and whether the assessment accurately reflects both the in-court and out-of-court duties of a judge?

QUESTIONS SUBMITTED BY SENATOR KLOBUCHAR FOR TIMOTHY M. TYMKOVICH

QUESTIONS FOR THE RECORD
Senate Judiciary Committee
"Federal Judgeship Act of 2013"
September 10, 2013

Senator Amy Klobuchar

Questions for The Honorable Timothy Tymkovich

1. I have heard from the judges and public defenders and others in my state and elsewhere about the negative impact that sequestration has had on the courts, and about the impact of existing judicial vacancies. I would imagine those two factors only multiply the impact of the need for more judgeships. What has been the combined impact of sequestration, judicial vacancies and too few judgeships?

2. At what point does a delay in justice, due to overwhelmed courts, become a substantive impediment to justice? Have we reached that point in some of the districts and circuits?

RESPONSES OF TIMOTHY M. TYMKOVICH TO QUESTIONS SUBMITTED BY SENATORS COONS AND KLOBUCHAR

COMMITTEE ON JUDICIAL RESOURCES
of the
JUDICIAL CONFERENCE OF THE UNITED STATES

HONORABLE TIMOTHY M. TYMKOVICH, CHAIR
HONORABLE LYNN S. ADELMAN
HONORABLE LINDA R. ANDERSON
HONORABLE TIMOTHY BURGESS
HONORABLE ERIC L. CLAY
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HONORABLE WILLIAM H. PRYOR JR.
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HONORABLE DALE L. SOMERS
HONORABLE LAWRENCE F. STENGEL
CHAIR, SUBCOMMITTEE ON JUDICIAL STATISTICS
HONORABLE DOUGLAS P. WOODLOCK

October 2, 2013

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for inviting me to testify at the recent hearing on "The Federal Judgeship Act of 2013" before the Senate Judiciary Subcommittee on Bankruptcy and the Courts. I am pleased to answer written questions from Senators Chris Coons and Amy Klobuchar, and I write on behalf of the Judicial Conference of the United States to transmit answers.

As I testified to during the hearing, the Federal Judiciary has seen a 39 percent increase in filings at the district court level and a 34 percent increase in filings at the appellate level since the last comprehensive judgeship legislation was approved by Congress in 1990. And yet, there has been only a 4 percent increase in district court judgeships over this time. More judgeships are needed to handle this growth in an efficient and expeditious manner. Because the Judiciary is unable to control the amount of work that comes through courthouse doors, we can only request that the requisite resources be available to fairly adjudicate each case presented.

The jurisdiction of the Judicial Conference Committee on Judicial Resources relates to issues of human resource administration, including the need for additional Article III judges. Senator Klobuchar's first question, however, in part addresses the impact the sequester has had on the Federal Judiciary. As this issue is within the jurisdiction of the Judicial Conference Committee on the Budget, I have conferred with Judge Julia Smith Gibbons, that Committee's chair, in answering the question.

With this context as background, answers to the Subcommittee members' questions follow. I respectfully request that this letter be made a part of the hearing record as well.

Sincerely,

Timothy M. Tymkovich

Timothy Tymkovich

Enclosures

Answer to Senator Chris Coons' question

Question:
During the hearing you briefly addressed some of the criticisms regarding the Conference's methodology used when evaluating a district's request for additional judgeships. Would you provide a more detailed response regarding how your committee assesses the need for judgeships and whether the assessment accurately reflects both the in-court and out-of-court duties of a judge?

Answer:
As detailed in my written testimony, the Judicial Conference reviews the Article III judgeship needs of the courts biennially using a six-step review process that involves the individual court requesting additional resources, that court's circuit judicial council, the Judicial Resources Committee's Subcommittee on Judicial Statistics, the full Judicial Resources Committee, and the Judicial Conference. The Conference will never go beyond the individual court's request, or consider additional resources in the absence of a request, despite the fact that the caseload may indicate otherwise.

The recommendations are based in large part on a numerical caseload standard. For the district courts, the Conference standard is 430 weighted filings per authorized judgeship after accounting for the additional judgeships requested by the court. For the courts of appeals, the Conference uses a standard of 500 adjusted filings per panel, also after accounting for the additional judgeships requested by the court.

The numeric standards represent the caseload at which the Conference begins to consider requests for additional judgeships. They are the starting points in the process, not the end points. Indeed, they are considered with other court-specific information to develop a thorough assessment of the judgeship needs of each court that submits a request for additional judgeships. Circumstances that are unique, transitory, or ambiguous are carefully considered so as not to result in an overstatement or understatement of the court's judgeship needs.

The caseload standard for the district courts is based on weighted filings statistics which account for the different amounts of time district judges require to resolve various types of criminal and civil cases. The current case weights have been in effect since 2004, when the Federal Judicial Center (FJC) completed an event-based study which included both in-court and out-of-court time required to resolve cases. The comprehensive study took into account how often the following events occur in cases, as well as the average time it takes district judges to handle them: trials and evidentiary hearings; non-evidentiary hearings and conferences; research, reading, and writing on orders responding to particular motions; and preparation for proceedings such as trials or sentencing hearings.

The method used by the FJC incorporated both empirical docketing data from courts' management reports and time data from statistical reports that the district judges prepare, and consensus time expenditure information from experienced judges. The study resulted in case weights that, when applied to 2003 national case filings, showed a five percent reduction in the national weighted caseload from the previous weights which had been in effect since 1993. A time-study had been used to develop the 1993 case weights.

In making judgeship recommendations, the Judicial Conference has accepted the FJC's event-based methodology. A time-study, as suggested by the Government Accountability Office (GAO) in its 2003 report, is not believed to be justified for several reasons. The event-based methodology provides accurate results in addition to providing significant resource savings as well as the ability to update case weights more frequently and efficiently when needed. Indeed, in their own report, the GAO noted these significant advantages of reduced judicial burden (allowing judges to focus on cases), cost savings, and faster development of case weights. Given the accuracy and the additional advantages resulting from the event-based study, the resource-intensive costs of a time-study are not considered to be warranted.

The standard of 500 adjusted filings per panel for the courts of appeals has been recognized outside the Judicial Conference as a useful and appropriate standard for assessing the judgeship needs of the courts of appeals. Data from the FJC support the 500 adjusted filings standard. Those data show that because only a very small percentage of pro se cases receive oral argument or a published opinion, it is reasonable to conclude that pro se cases contribute significantly less to the judicial workload. Additionally, Professor Arthur Hellman of the University of Pittsburgh School of Law, a noted expert on federal court issues, testified before a House Judiciary Subcommittee in 2003 that the one-third adjustment of pro se cases is "justified." Professor Hellman also testified that the 500 adjusted filings per panel standard is "quite defensible" and that the Conference has taken a "conservative approach" in assessing requests for new appellate judgeships.

Answers to Senator Amy Klobuchar's Questions

Question:
I have heard from the judges and public defenders and others in my state and elsewhere about the negative impact that sequestration has had on the courts, and about the impact of existing judicial vacancies. I would imagine those two factors only multiply the impact of the need for more judgeships. What has been the combined impact of sequestration, judicial vacancies, and too few judgeships?

Answer:
The sequestration cuts that took effect March 1, 2013, have had a devastating impact on federal court operations nationwide. The five percent across-the-board sequestration cut resulted in a nearly $350 million reduction in Judiciary funding. To address sequestration, the Executive Committee of the Judicial Conference implemented a number of "emergency measures" for FY 2013. Many of these measures have been painful and difficult to implement and reflect one-time reductions that cannot be repeated if future funding levels remain flat or decline. The Judiciary cannot continue to operate at such drastically reduced funding levels without seriously compromising the Constitutional mission of the federal courts. These emergency measures represent the Judiciary's best effort to minimize the impact of sequestration cuts on the federal courts and the citizens it serves.

As a result of sequestration, funding allocations sent out to nearly 400 court units nationwide were cut 10 percent below the FY 2012 level. Due to flat budgets followed by sequestration, on a national basis, court staffing levels in clerks of court and probation and pretrial services offices are down nearly 2,500 staff since July 2011, an 11 percent decline. This includes 1,000 staff the courts have lost so far in FY 2013 (through August 2013). We believe the staffing losses are resulting in the slower processing of civil and bankruptcy cases which will impact individuals, small businesses, and corporations seeking to resolve disputes in the federal courts.

We are particularly concerned about sequestration cuts to the Judiciary's probation and pretrial services program and the impact on public safety. Sequestration has reduced funding for probation and pretrial services officer staffing throughout the courts, which means less deterrence, detection, and response to possible resumed criminal activity by federal defendants and offenders in the community. In addition, law enforcement funding to support GPS and other electronic monitoring of potentially dangerous defendants and offenders has been cut 20 percent. Equivalent cuts to funding for drug testing, substance abuse and mental health treatment of federal defendants and offenders have also been made, increasing further the risk to public safety.

We are also concerned about the $52 million sequestration cut to the Judiciary's Defender Services program. Sequestration cuts threaten the ability of the Judiciary to fulfill a fundamental right guaranteed to all individuals under the Sixth Amendment: the right to

court-appointed counsel for criminal defendants who lack the financial resources to hire an attorney. Cuts to federal defender organizations threaten delays in the progress of cases, which may violate Constitutional and statutory speedy trial mandates. Sequestration has resulted in payments to private panel attorneys being suspended the last two weeks in FY 2013, and federal defender offices have implemented staffing reductions and widespread furloughs. The uncertainty of the availability of federal defender attorneys and the anticipated suspension of panel attorney payments will create the real possibility that panel attorneys may decline to accept Criminal Justice Act appointments in cases that otherwise would have been represented by federal defender offices.

Security at courthouses has suffered as well. Sequestration has resulted in a 30 percent cut in funding for court security systems and equipment and court security officers are being required to work reduced hours, thus creating security vulnerabilities throughout the federal court system. A high level of security for judges, prosecutors, defense counsel, jurors and litigants entering our courthouses must be maintained.

Along with the severe operational concerns resulting from the sequester, the Federal Judiciary continues to lack the requisite number of federal judges able to handle the growing caseload in the federal courts. Simply put, the Judicial Conference believes that all judicial vacancies should be filled unless otherwise stated. However, because the authority to appoint and confirm a federal judge exists outside the Federal Judiciary along with the fact that the number of vacancies in a court may vary at any given time, the Conference's survey process presumes each court is working with its full complement of statutorily authorized judgeships. Consequently, the caseload standards that the Conference uses as the threshold for considering judgeship requests is based on the caseload per authorized judgeship, regardless of whether a given judgeship is currently occupied by a sitting judge.

During FY 2012, weighted filings exceeded 600 per judgeship in 17 district courts in which the Conference is recommending additional judgeships. The weighted caseload exceeded 700 per judgeship in five of these courts, including three with over 1,000 weighted filings per authorized judgeship. On those courts where vacancies exist, the burden placed on the sitting judges is even higher than the enormous weighted filings per authorized judgeship statistics, and the resulting judgeship recommendations, would reveal. For example, during FY 2012 the District of Arizona had 712 weighted filings per authorized judgeships. As of September 20, 2013, six of the court's 13 authorized judgeships are vacant. As a result, the number of weighted filings exceeds 1,300 per active judge, more than three times the Conference standard for considering requests for additional judgeships.

The lack of new judgeships is having a tremendous impact on our courts. For example, in the Eastern District of California, parties seeking civil jury trials have to wait, on average, almost four years. The impact of the sequester and the severe operational concerns that now exist as a result have only compounded judicial resource shortages already experienced by the Federal Judiciary. In fact, in many ways, if continued, these effects would exacerbate the delays and problems courts are dealing with today. To ensure the Federal Judiciary is able to continue to effectively and expeditiously administer justice, adequate resources and funding must be made available.

Question:
At what point does a delay in justice, due to overwhelmed courts, become a substantive impediment to justice? Have we reached that point in some of the districts and circuits?

Answer:
Yes, we have reached that point in some courts. During FY 2012, three district courts experienced over 1,000 weighted filings per authorized judgeship, and five district courts (the District of Delaware, the Eastern District of California, the Eastern District of Texas, the Western District of Texas, and the District of Arizona) have averaged over 700 weighted filings per judgeship over the past three years. These extremely high caseloads often result in an impediment to justice. As Judge Sue Robinson noted in her written statement to the Subcommittee, "I can tell you that I'm double- and even triple-booked for patent trials through 2015, that I have 327 patent cases on my personal docket with 141 pending motions. I have two law clerks who assist me with my patent docket. We cannot keep this level of work up indefinitely and do our jobs well. Indeed, the statistics are starting to demonstrate a downward trend in terms of our ability, as a Court, to resolve motions and get to trial timely."

In the Eastern District of California, even with extensive use of magistrate and senior judges and the assistance of numerous visiting judges, parties seeking civil jury trials wait, on average, almost four years from filing for their trial to begin; nearly two years longer than the national average. Additionally, in courts with heavy criminal caseloads, civil cases often languish because judges are forced to concentrate on criminal prosecutions to ensure that Speedy Trial Act requirements are met. As a result, litigants may accept less than advantageous settlements rather than go to trial because of the lengthy delays due to the extremely high caseloads and lack of needed judicial resources.

Federal Judgeship Act of 2009

September 25, 2009

Executive Summary

On Wednesday, September 30, 2009, the Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, will hold a hearing on S. 1653, the Federal Judgeship Act of 2009. The Act creates new permanent and temporary federal appellate and district court judgeships. While we encourage Congress to create new judgeships if there is a clear and demonstrable need for them, we are concerned that S. 1653 could bring partisan politics into the process of creating judgeships. The Senate Judiciary Committee should ascertain the true need for additional judgeships before assuming the cost for new judgeships. It should also delay the effective date for any new judgeships until after the next presidential election.

I. Introduction

On September 8, 2009,[1] Senator Patrick Leahy introduced S. 1653, the Federal Judgeship Act of 2009 ("Act").[2] Effective upon enactment,[3] the Act would add nine permanent and three temporary judgeships to the United States Circuit Courts of Appeals.[4] The newly created permanent judgeships would be as follows: one for the First Circuit, two for the Second Circuit, one for the Third Circuit, one for the Sixth Circuit, and four for the Ninth Circuit.[5] The newly created temporary judgeships would be one each for the Third, Eighth, and Ninth Circuits.[6] The Act would also add thirty-eight permanent and thirteen temporary judgeships to various United States District Courts,[7] convert five existing temporary United States District Court judgeships into permanent positions, and extend one existing temporary position.[8]

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[1] *See* Press Release, Senator Patrick Leahy, Leahy Introduces Bill to Authorize Federal Judgeships (Sept. 8, 2009), *available at* http://leahy.senate.gov/press/200909/090809c.html.
[2] Federal Judgeship Act of 2009, S. 1653, 111th Cong. (2009).
[3] *Id.* § 5.
[4] *Id.* § 2.
[5] *Id.* § 2(a).
[6] *Id.* § 2(b).
[7] *Id.* § 3.
[8] *Id.* § 3(c).

II. History of Judgeship Bills

Since the Constitution came into effect, Congress has modified the federal judiciary in many ways through the creation of lower courts and the authorization of judgeships. The last comprehensive judgeships act passed in 1990.[9] Although Congress has authorized additional district court judgeships and extended temporary judgeships since 1990,[10] it remains that "judgeship needs have been addressed piecemeal, first in 1999 with the creation of nine judgeships in the omnibus appropriations act, and again in 2000 when [ten] new Article III judgeships were included in the Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Act."[11]

Over the past decade, judgeship bills have been introduced in nearly every Congress since the 105th Congress, but have all died before being enacted.[12] For example, in 1997, Senator Leahy introduced the Federal Judgeship Act of 1997,[13] which would have added, effective upon date of enactment, permanent and temporary court of appeals and district court judgeships.[14] Senator Grassley, then-chair of the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, "requested that the General Accounting Office review the basis upon which the Judicial Conference made its request for Article III and bankruptcy judgeships" in the proposed legislation, and held hearings in which judges were called to "testify on the need for new judgeships and the use of current resources."[15] The bill ultimately failed to pass.[16]

During the 110th Congress, Senator Leahy introduced S. 2774, the Federal Judgeship Act of 2008. Upon introducing the bill, Senator Leahy observed that

> "Without a comprehensive bill, Congress has proceeded to authorize only a few additional district court judgeships and extend temporary judgeships when it could. For instance, in 2002 we were able to provide for 15 new judgeships in the Department of Justice authorization bill. However no additional circuit court judgeships have been created since 1990 despite their increased workload. . . . Our Federal judges are working harder than ever, but in order to maintain the integrity of the Federal courts and the promptness that justice demands, judges must have a manageable workload."[17]

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[9] *See* Leahy Introduces Bill to Authorize Federal Judgeships, *supra* note 1.
[10] *Id.*
[11] The Third Branch, Judicial Conference Again Asks for New Judgeships to Meet Court Needs, http://www.uscourts.gov/ttb/feb01ttb/page2.html (last visited Sept. 16, 2009).
[12] *See* S. 678: Federal Judgeship Act of 1997, Related Legislation, http://www.govtrack.us/congress/bill.xpd?bill=s105-678&tab=related (last visited Sept. 17, 2009); The Third Branch, End of the 105th Congress Resolves Legislative Action, http://www.uscourts.gov/ttb/nov98ttb/105congres.html (last visited Sept. 17, 2009).
[13] *See* Federal Judgeship Act of 1997, S. 678, 105th Cong. (1997).
[14] *Id.* §§ 2-3, 5.
[15] The Third Branch, End of the 105th Congress Resolves Legislative Action, http://www.uscourts.gov/ttb/nov98ttb/105congres.html (last visited Sept. 17, 2009).
[16] *Id.*
[17] S. REP. NO. 110-427, at 2 (2008) (quoting 154 CONG. REC. S2138-01, S2153 (daily ed. Mar. 13, 2008) (statement of Chairman Leahy)).

The bill was scheduled to receive a hearing in June 2008; however, the hearing was suspended after Republicans invoked a Senate procedural rule to protest the slow pace of confirmations for federal appeals court judges.[18] The bill, which would have gone into effect on January 21, 2009 and had bipartisan support,[19] passed out of the Judiciary Committee in July 2008, but the full Senate never acted on it.

In the Senate Report submitted with the bill, four Republican Senators challenged the Judicial Conference's recommendations on the number of needed judgeships. The Senators stated,

> We are of the position that if there is a clear, demonstrated need for new judgeships, the Congress should act to create those positions. There may well be a need for some of the judgeships contained in S. 2774. However, the GAO continues to find that the Judicial Conference's methodology is flawed and unreliable. . . . [T]he federal judiciary has not proven that it has taken every step it can to improve efficiencies, be it through use of technology, case management techniques, or senior/magistrate/visiting judges. Further, there are significant costs that come with creating new permanent and temporary judgeships. For these reasons, we believe that the Judiciary Committee should not be quick to rubber-stamp the AO's request in S. 2774. Moreover, because of the continued findings by the GAO that the methodologies utilized by the Judicial Conference are not accurate and could be improved, we believe that the AO should implement the GAO's recommendations before it submits—and Congress approves—any further judgeship requests.[20]

Upon reintroducing the Federal Judgeships Act in the 111th Congress, Senator Leahy stated that case filings in federal appellate and district courts have risen since 1990. Thus, Senator Leahy asserted, Congress should pass a comprehensive judgeships bill to "ease the strain of heavy caseloads that has burdened the courts and thwarted the administration of justice."[21] It is likely, however, that Republicans, who have yet to sign on to the bill, will have concerns about the legislation.

III. Concerns About the Act

We agree with Senators Grassley, Sessions, Brownback, and Coburn that if there is a clear need for new judgeships, those judgeships should be created. However, the creation of new judgeships by Congress should not be used as a political tool to reshape the federal judiciary. For that reason, we recommend that any judgeships bill contain safeguards to ensure that the independent judiciary remains just that—independent.

A. Possible Inaccuracy of the Judicial Conference's Recommendations

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[18] The Third Branch, Judicial Confirmations at Center of Cancelled Hearing, July 2008, http://www.uscourts.gov/ttb/2008-07/article07.cfm (last visited Sept. 17, 2009).
[19] *See* Federal Judgeship Act of 2008, S. 2774, 110th Cong. § 5 (2008).
[20] S. REP. NO. 110-427, at 19 (2008) (statement of Sens. Grassley, Sessions, Brownback, and Coburn).
[21] Leahy Introduces Bill to Authorize Federal Judgeships, *supra* note 1.

The newly created judgeships are based on recommendations by the Judicial Conference of the United States,[22] which was created by Congress to offer policy recommendations on the structure and operation of the federal judiciary.[23] Yet, unlike Congress, the Judicial Conference is not directly accountable to the people.

Assessments of the need for more judgeships demand more scrutiny before casting this cost onto the taxpayer. It costs approximately $1,062,000 to create a circuit court judgeship the first year, and approximately $931,000 each subsequent year to maintain it.[24] A district court judgeship costs slightly more—approximately $1,169,000 the first year, and $960,000 each subsequent year.[25] In recent prepared testimony for a Senate Judiciary Committee hearing, William O. Jenkins, Jr., director of Homeland Security and Justice at the Government Accountability Office ("GAO"), stated that "neither [the GAO] nor the Judicial Conference can assess the accuracy of adjusted case filings as a measure of the case-related workload of courts of appeals judges."[26] In 2003, the GAO had produced a report on the accuracy of the weighted and adjusted case filings systems for calculated judicial workload.[27] "The GAO concluded that there were problems with the reliability of both district and appellate court methodologies."[28] In 2008,

> Mr. Jenkins reiterated his concerns with the reliability of the AO's methodology, and specifically questioned the accuracy of the case weights used by the AO to assess judgeship needs. Mr. Jenkins noted that notwithstanding the findings of the 2003 GAO report, the AO had not implemented their recommendations to improve the accuracy of their methodology.[29]

Given the uncertainty surrounding the need for new judgeships, and the fact "that it is easier to create judgeship positions than to eliminate them," "Congress must be reasonably confident that, before it creates new federal court judgeships and expands the federal judiciary on a permanent basis, it does so based upon accurate and complete information."[30] One way to do this, as Senators Grassley, Sessions, Brownback, and Coburn suggested, is for Congress, before it creates new judgeships based on possibly inaccurate information, to fill the current judicial vacancies.[31] According to the Administrative Office of the U.S. Court's website, as of September 25, 2009, there are twenty current vacancies to the U.S. Courts of Appeals, and seven nominees

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[22] *See* Leahy Introduces Bill to Authorize Federal Judgeships, *supra* note 1. For the actual judgeship recommendations, see Press Release, The Third Branch, Judicial Conference Judgeship Recommendations (Mar. 2009), *available at* http://www.uscourts.gov/Press_Releases/2009/recommendations.pdf.
[23] *See* 28 U.S.C.S. § 331.
[24] S. REP. NO. 110-427, at 17 (2008) (statement of Sens. Grassley, Sessions, Brownback, and Coburn).
[25] *Id.*
[26] *Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2008: Hearing Before the S. Judiciary Comm.*, 110th Cong. 95 (2008) (statement of William O. Jenkins, Jr., Director, Homeland Security and Justice, Government Accountability Office).
[27] S. REP. NO. 110-427, at 18-19 (2008) (statement of Sens. Grassley, Sessions, Brownback, and Coburn).
[28] *Id.* at 18.
[29] *Id.* at 19.
[30] *Id.* at 17.
[31] *Id.*

to fill those vacancies.[32] There are seventy-four current vacancies to federal district court benches, with nine nominees awaiting confirmation.[33] The site also lists twenty-six future vacancies.[34] During the previous administration, the Senate failed to confirm numerous well-qualified judicial nominees, such as Judge Robert Conrad, Rod Rosenstein, Steve Matthews, and Peter Keisler. If there is such a great need for judges, then these well-qualified individuals should have been confirmed. Before Congress creates additional judgeships, the existing vacancies should be filled with similarly well-qualified individuals. If the courts still find themselves in need of additional judges after the existing vacancies are filled, then Congress should consider judgeships legislation.

B. Date of Effectiveness

The date of effectiveness in a judgeship bill can serve as a political tool to reshape the judiciary. The judgeships bill introduced in the 110th Congress, while the Democrats controlled Congress and the Republicans controlled the White House, would have come into effect on January 21, 2009,[35] after the new president assumed office, thus eliminating concerns about partisan court-packing. As Senator Hatch, a co-sponsor of the 2008 Act, noted at its introduction,

> Americans are blessed to have the best and most independent judicial system in the world. In our constitutional framework, Congress has responsibility to both make the laws and ensure that the judiciary tasked with interpreting and applying those laws has the appropriate resources. This includes addressing the staffing and compensation needs of the judicial branch, and we should strive to do so without political gambles or speculation about the outcome of a Presidential election.[36]

The current bill, however, provides that it "shall take effect on the date of enactment of this Act."[37] If the bill passes this Congress, President Obama would be tasked with immediately filling all of the new permanent and temporary judgeships with nominees whom he has selected and who represent his judicial philosophy. While every president leaves his mark on the judiciary, this would certainly increase the extent of President Obama's mark.

To further the goal of an independent judiciary and to avoid any attempts by Congress to use the judgeships bill to attempt to reshape the federal judiciary, the bill should be amended to come into effect on January 21, 2013. While this change would delay filling these new judgeships, such a delay is a small price to pay for Congress to avoid partisan interference with the federal judiciary.

Furthermore, the Act will likely garner more bipartisan support with an amendment of this type. For example, a Republican aide noted that Senator Hatch "would consider cosponsoring the

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[32] Summary of Judicial Vacancies, U.S. Courts, Administrative Office of the U.S. Courts, http://www.uscourts.gov/judicialvac.cfm (last visited Sept. 25, 2009).
[33] *Id.*
[34] *Id.*
[35] *See* Federal Judgeship Act of 2008, S. 2774, 110th Cong. § 5 (2008).
[36] S. REP. NO. 110-427, at 3 (2008) (quoting 154 CONG. REC. S2138-01, S2154 (Mar. 13, 2008) (statement of Sen. Hatch)).
[37] Federal Judgeship Act of 2009, *supra* note 2, § 5.

[Act] again if the effective date were changed to Jan[uary] 21, 2013."[38] In response, "Democrats contend that a postponed effective date has been the exception, not the rule, for proposals of this kind," citing for support "the last comprehensive [judgeship] bill [passed] in 1990, when a Democratic Congress and a Republican president agreed on an immediate increase" of judgeships.[39]

Another suggestion to ameliorate partisan interference in the molding of the judiciary is to stagger the creation of the new judgeships to include some judgeships created before the next presidential election, and some after the election. This solution should alleviate concerns about partisan court-packing.

C. The Act Allows Even More Partisan Interference over the Courts than it First Appears

The Act allows even more partisan interference over the courts than it first appears, as the temporary judgeships are lifetime appointees, and thus are effectively permanent positions. As Ed Whelan, president of the Ethics and Public Policy Center, pointed out, the distinction between the temporary and permanent judgeships created is,

> irrelevant from the perspective of President Obama's appointment power, since Obama would fill the new "temporary" judgeships with lifetime (not temporary) appointments . . . . The distinction matters only 10 years or more down the road when the first vacancy occurs on the court with a temporary judgeship: whoever is president at that time would not be able to fill the vacancy (which means that the number of actual judgeships on that court would then equal the permanent authorized number).[40]

Therefore, if the legislation passed, President Obama would be able to immediately fill all of the judgeships created by the bill with lifetime appointees. Furthermore, future presidents would be prevented from filling vacancies on the courts with temporary judgeships when a vacancy occurs. In order to avoid encroaching on a future president's ability to fill judicial vacancies, these temporary judgeships should be removed from the bill.

IV. Conclusion

This bill, if enacted, will have a profound effect on the federal judiciary. We urge Congress to modify the legislation in several ways to (1) avoid partisan interference with the judiciary's operation, and (2) ensure taxpayer money is spent wisely and efficiently. While it is recognized that federal judgeship nominees will likely possess similar views to those of the president, the judiciary has always been viewed as set apart from partisan politics to some degree. Legislation passed to alter the judiciary by enabling the appointment of judges holding a certain political viewpoint is to be discouraged. While it is recognized that a certain amount of partisan

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[38] David Ingram, *Without GOP Support, Leahy Pushes for More Judges*, Blog of LegalTimes, Sept. 9, 2009, http://legaltimes.typepad.com/blt/2009/09/without-gop-support-leahy-pushes-for-more-judges.html.
[39] *Id.*
[40] Ed Whelan, *Re: Senator Leahy Wants Judges*, National Review: Bench Memos, Sept. 10, 2009, http://bench.nationalreview.com/post/?q=ODg2OWQ1ZmJkMWExNGFjNjU3YjA5MjkwYWU1Mjg5ZjE=.

entanglement is unavoidable by the fact that the judiciary will need to be modified and expanded at certain points during our nation's growth, and this expansion will be conducted by politicians, the judiciary's independence must be cultivated, and with that aim in mind, we urge that several of the solutions and proposals contained within this document be incorporated into the Act.

September 10, 2013

S.1385: Federal Judgeship Act of 2013

On behalf of our hundreds of thousands of members across the country, People For the American Way commends the Subcommittee on Bankruptcy and the Courts for holding this hearing on the Federal Judgeship Act of 2013.

America's federal courts play a critical role for our nation and in our communities. Indeed, "having one's day in court" is fundamental to our conception of fairness and justice. Individuals and businesses alike rely on a properly functioning federal court system to ensure that the rule of law upon which our society and economy are based can continue.

But that system falls apart if there aren't enough judges to hear cases in a timely manner, and that is the situation in which we find ourselves. Since federal judges are required to give priority to criminal cases over civil ones, an increase in criminal cases without a concomitant increase in judges by necessity results in less time available to civil cases. Since 1990 (the last time Congress passed a comprehensive judgeship bill[1]), the number of criminal cases pending in district courts has more than doubled from 36,170 to 76,014, while Congress has increased the number of district court judgeships by only 4%. With the number of criminal cases surging, judges are forced to delay civil cases, often for years. This means long delays for Americans seeking justice in cases involving job discrimination, civil rights, predatory lending practices, consumer fraud, immigrant rights, the environment, government benefits, business contracts, mergers, copyright infringement, and a variety of other areas.

Court delays damage small businesses as well as individuals, whether they are seeking to vindicate their rights as plaintiffs or to put a lawsuit behind them. Courts – the infrastructure of justice – are just as important to the rule of law as roads and bridges are to transportation. Without enough judges, that infrastructure crumbles. That is why making our courts fully functional is a basic issue of good government.

The entity responsible for assessing the federal courts' ability to effectively manage their caseloads is the Judicial Conference of the United States, which was created by Congress in 1922. The Chief Justice presides over the Conference, whose members are the chief judge of each circuit, the chief judge of the Court of International Trade, and one district court judge from each of the regional circuits. The Judicial Conference is specifically charged with making policy (or,

[1] Judicial Improvements Act of 1990, Pub. L. No. 101-650.

as appropriate, policy recommendations) with regard to the administration of federal courts. Among its statutory responsibilities are to "make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary."[2]

Therefore, the Judicial Conference regularly surveys every federal circuit and district court in the nation, obtaining detailed information about their caseloads. Such information includes the numbers of cases filed, terminated, or pending both in raw numbers and (for district courts) weighted by complexity and resources needed to process. In order to get as accurate and comprehensive a picture as possible, the analysis includes great detail on a variety of other factors. For circuit courts other than the Federal Circuit, these include how many decisions are written vs. unwritten, how many are based on the merits and how many are procedural, how many are terminated after oral hearings and after submission on briefs, and how many are terminated with written signed opinions, and how many cases are of particular types (e.g., prisoner appeals, criminal appeals, and administrative appeals). For district courts, factors analyzed include the basis of jurisdiction, the general category of civil suits, and whether the case was terminated before or after trial, and whether the district received assistance from or provided assistance to other district courts. Due to the level of detail, the tables presenting the data take hundreds of pages.

Based on this data and upon input from the courts themselves, the nonpartisan Judicial Conference has requested Congress to create 91 new federal judgeships:

- For the 9th Circuit, five judgeships (one of which would be temporary);
- For the 6th Circuit, one new judgeship; and
- For the district courts, 85 new judgeships (20 of which would be temporary).

It is this set of proposals that the Federal Judgeship Act of 2013 would set into law.

Adopting the Judicial Conference's recommendations would improve access to justice for individuals and businesses alike in every region of America. The affected districts are located throughout the country, in ten of the twelve regional circuits. Stories about the impact in affected districts on already overworked judges and on Americans who are being denied their timely and fair day in court are powerful. For example:

- The Western District of Texas, which has one judicial emergency, and which includes much of the state's border with Mexico. The Judicial Conference has asked Congress to create five additional judgeships there, one of which would be temporary. The situation in the Western District is so pressured that Judge David Ezra of Hawaii took senior status last year and moved to Texas, saying, "This is corollary to having a big wild fire in the

[2] 28 U.S.C. 31.

Southwest Border states, and fire fighters from Hawaii going there to help put out the fire." Chief Judge Fred Biery has described the judges there as "pedaling as fast as we can on a rickety bicycle."

- California's Eastern District, which has a judicial emergency and which the Ninth Circuit's chief judge calls the most overloaded court in the circuit. Earlier this year, Sen. Feinstein noted that "[i]t takes a criminal case 30 percent longer to be completed than it did in 2009, and a civil case takes nearly four years to get to trial, up nearly 50 percent from two years ago and nearly twice the national average." The Judicial Conference has requested Congress to create 7 additional judgeships there.

This hearing provides the best opportunity to learn from the nonpartisan experts why they made their specific recommendations. The Judicial Conference regularly makes its caseload data public, and it similarly makes its request for judgeships public. With this hearing members of the subcommittee will have the opportunity to inquire about the basis for the current request, and Congress will have public information upon which to make objective, non-partisan determinations as to where additional judgeships are needed.

This is the proper way for Congress to legislate on something as important as maintaining the third branch of government.

Marge Baker
Executive Vice President for Policy and Program
People For the American Way

Paul Gordon
Senior Legislative Council
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Testimony of Alicia Bannon
Counsel, Brennan Center for Justice at NYU School of Law

On S. 1385, Federal Judgeship Act of 2013

Submitted to Senate Judiciary Subcommittee on Bankruptcy and the Courts

September 10, 2013

The Brennan Center for Justice at NYU School of Law[1] thanks the Subcommittee on Bankruptcy and the Courts for holding this hearing on the Federal Judgeship Act of 2013 (the "Act"). The Act would play a vital role in ensuring that Americans enjoy meaningful access to justice in the federal courts, and the Brennan Center urges its prompt passage.

Over the past two decades, the federal courts have faced a growing disparity between caseloads and the number of judges on the bench. These rising judicial workloads burden the administration of justice and harm the individuals and businesses that rely on the courts to protect their rights and resolve their disputes. The Federal Judgeship Act of 2013 represents an important step in addressing this growing judge gap, ensuring that courts have the capacity to fairly and efficiently adjudicate the cases that appear before them.

The Act would implement the judgeship recommendations of the Judicial Conference of the United States, chaired by Chief Justice John Roberts, which are based on a careful analysis of individual districts' and circuits' judicial workloads and case complexity. Following the Judicial Conference's recommendations, the Act creates five permanent and one temporary circuit court judgeships and 65 permanent and 20 temporary district court judgeships. It also gives permanent status to eight temporary district court judgeships.

The Brennan Center supports the proposed additional judgeships in both the circuit and district courts, which have both seen dramatic increases in their caseloads since the most recent comprehensive judgeship bill was enacted in 1990. Because there has been extensive attention to the caseload challenges facing the circuit courts, and because we expect that the subcommittee will hear substantial testimony on how the circuit courts are being affected, this testimony focuses on the challenges faced by the federal district courts. In particular, we submit this

[1] The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. The Center's Fair Courts Project works to promote fair and impartial courts as a guarantor of equal justice in America's constitutional democracy.

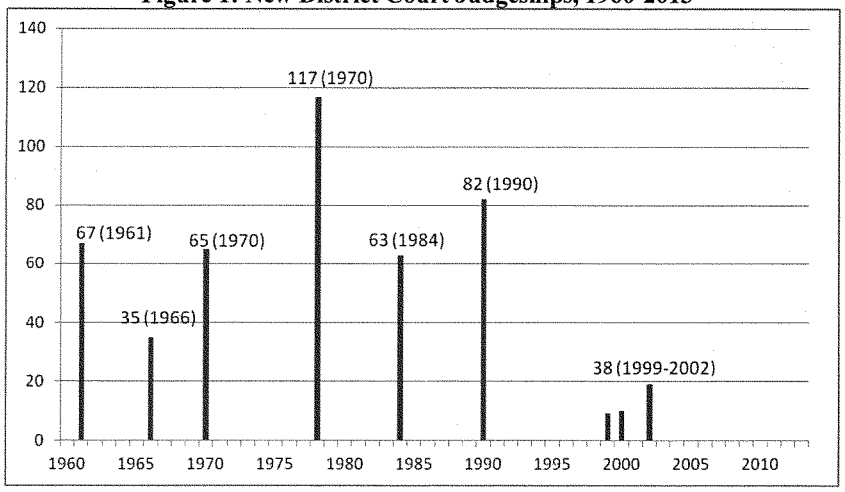
testimony to share our research regarding judicial shortages in the district courts, and the impact that these shortages have on access to justice for litigants around the country. We urge the Subcommittee on Bankruptcy and the Courts to approve the Act without delay and to take all necessary steps to ensure its prompt consideration by the full Judiciary Committee.

I. Breaking with historical patterns, district courts have not had a major increase in the number of judgeships since 1990

Since 1990, district courts have experienced a stark decline in the number of new judgeships authorized by Congress. As reflected in Figure 1, between 1961 and 1990, Congress authorized major increases to the number of district court judgeships an average of every six years. In total, 429 new district court judgeships were added during this period (including the creation of new permanent and temporary judgeships and the conversion of temporary judgeships into permanent positions), for an average of 14.3 new judgeships per year.

In contrast, since the last comprehensive judgeship act in 1990, district courts have experienced only minor additions to their ranks. Congress authorized nine additional permanent judgeships in 1999 and 10 additional permanent judgeships in 2000. In 2002, it authorized eight permanent and seven temporary judgeships, in addition to converting four temporary judgeships into permanent positions. These 38 new judgeships over the course of more than twenty years average to only 1.7 new judgeships per year.

Figure 1: New District Court Judgeships, 1960-2013[2]



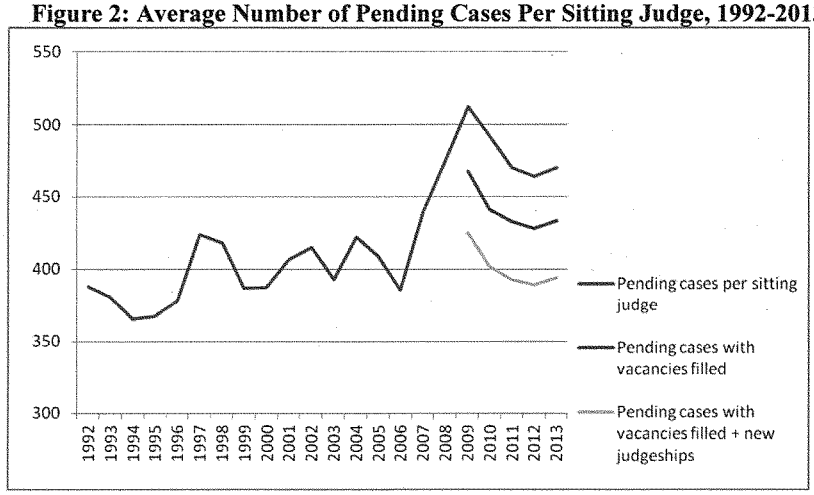
[2] *See* ALICIA BANNON, BRENNAN CENTER FOR JUSTICE, FEDERAL JUDICIAL VACANCIES: THE TRIAL COURTS 6 (2013), *available at* http://www.brennancenter.org/publication/federal-judicial-vacancies-trial-courts.

II. District court judges' workloads are growing increasingly unmanageable, impeding their ability to effectively dispense justice

While the creation of new district court judgeships has lagged since 1990, judges' workloads have increased dramatically, leaving judges with record caseloads in recent years. Total filed cases in the district courts have increased by 43 percent since 1992, while total "weighted filings," the number of filed cases weighted by an estimate by the Administrative Office of the U.S. Courts as to how time-consuming they are likely to be, has grown 14.8 percent since 1999 (the earliest year for which comparable data is available).[3] The total number of pending cases has likewise increased by 40 percent between 1992 and 2013, from 262,805 to 370,067 cases, reflecting a growing backlog.

District court judgeships have not kept pace. Since 1992, the number of pending cases per authorized judgeship has increased by 35 percent. Estimates of the workload of all sitting judges – including both active judges and senior judges, who typically work part-time – likewise shows dramatically increasing burdens for judges. As reflected in Figure 2, the average number of pending cases per sitting judge (defined as active judges plus senior judges counted as half-time because of their reduced workloads) reached an all-time high in 2009. This figure was higher as of March 31, 2013 than at any point from 1992-2007.

Figure 2: Average Number of Pending Cases Per Sitting Judge, 1992-2013



[3] Analysis in this section based upon data maintained by the Administrative Office of the United States Courts. Data for 2013 reflects the 12-month period ending March 31, 2013. *See* Administrative Office of the United States Courts, Federal Court Management Statistics, http://www.uscourts.gov/Statistics/FederalCourtManagement Statistics.aspx; *see also* Bannon, *supra* note 2 at 5-6 (utilizing data through September 30, 2012).

While the current high level of judicial vacancies partially explains this high per-judge burden, even if every existing vacancy were filled, the existing workload per sitting judge would still exceed historical levels, as reflected by the red line in Figure 2. In contrast, the green line estimates what per-judge caseloads would be if all 2009-2013 vacancies had been filled and Congress had created 85 additional district court judgeships (the number of additional permanent and temporary judgeships proposed in the Act). As Figure 2 demonstrates, authorizing these additional 85 judgeships is necessary to restore the number of pending cases per sitting judge to the level of the late 1990s.

The growing workload in district courts around the country negatively impacts judges' ability to effectively dispense justice, particularly in complex and resource-intensive civil cases, where litigants do not enjoy the same "speedy trial" rights as criminal defendants. For example, the median time for civil cases to go from filing to trial has increased by more than 70 percent since 1992, from 15 months to more than two years (25.7 months). Older cases are also increasingly clogging district court dockets. Since 2000, cases that are more than three years old have made up an average of 12 percent of the district court civil docket, compared to an average of 7 percent from 1992-1999. For a small company in a contract dispute or a family targeted by consumer fraud, these kind of delays often mean financial uncertainty and unfilled plans, putting lives on hold as cases wind through the court system. All too often, justice delayed in these circumstances can mean justice denied.

These patterns of delay are starkly reflected in the districts for which additional judgeships are recommended, many of which lag behind the national average in key metrics. In the Eastern District of California, for example, the median time for civil cases to go from filing to trial is almost four years (46.4 months). This district would receive six additional permanent judgeships and one additional temporary judgeship under the Act. In the Middle District of Florida, over 23 percent of the civil docket is more than three years old. This district would receive five additional permanent judgeships and one additional temporary judgeship under the Act.

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The federal courts are a linchpin of our democracy, protecting individual rights from government overreach, providing a forum for resolving individual and commercial disputes, and supervising the fair enforcement of criminal laws. In order for judges to perform their jobs effectively, however, they must have manageable workloads. The Brenan Center urges Congress to promptly pass the Federal Judgeship Act of 2013, so as to ensure the continued vitality of our federal courts.

Justice at Stake

September 10, 2013

The Honorable Christopher Coons
Chairman
Senate Judiciary Committee, Subcommittee on Bankruptcy & the Courts
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jefferson Sessions III
Ranking Member
Senate Judiciary Committee, Subcommittee on Bankruptcy & the Courts
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Coons and Ranking Member Sessions:

On behalf of Justice at Stake (JAS), a nonpartisan, national partnership[1] of more than fifty organizations dedicated to keeping our courts fair and impartial, I write to thank you for your attention to the issue of staffing our federal courts. Today's hearing on the Federal Judgeship Act of 2013 (S. 1385) raises important issues at a critical time for our courts and for the Americans who depend upon them.

In a July 31, 2013 letter to Majority Leader Harry Reid and Republican Leader Mitch McConnell, JAS already expressed its support for the Federal Judgeship Act of 2013, but we reiterate that strong support today. This bill would create 91 new federal judgeships in two federal circuits and 32 judicial districts across 21 states.

This legislation represents an important step toward addressing the growing disparity between the number of judges on the bench and the caseload that faces them. For more than 2 decades, there has been little congressional action to address judicial staffing deficits despite steadily increasing workload. Importantly, this legislation implements the recommendations of the nonpartisan Administrative Office of the United States Courts (AO) and the Judicial Conference of the United States, which is chaired by Chief Justice John Roberts. Created in 1939 to provide support and counsel to the Judicial Conference, the AO has long served as the source of thoughtful, non-partisan analysis and recommendations on resource allocation within the federal courts, including the number of authorized judgeships for each federal

[1] As with any diverse partnership, the views stated in this Justice at Stake letter do not necessarily reflect the positions of every JAS partner organization or board member.

circuit. The AO's recommendations are based on close analysis of data, including not only the number of cases heard by a court, but also the complexity of such cases.

JAS asks leaders from both sides of the aisle to work together to pass this commonsense legislation. Failing to provide adequate resources for our nation's courts—whether these resources be additional judgeships or desperately needed funds—imperils our ability to live up to our Constitution's promises. Inadequately providing for the courts harms the American people, who depend upon judges for the adjudication and protection of their rights, and American businesses that rely on the courts for the structural certainty necessary for economic growth.

JAS expresses its gratitude to you for your tireless efforts on behalf of the American public. We understand how many issues compete for the time and attention of your Subcommittee within the confines of a tight congressional calendar, so we're particularly grateful to you and your staff for the effort involved in today's hearing. If the members of your staff have any questions or want any additional information on this matter, please contact Praveen Fernandes, Director of Federal Affairs & Diversity Initiatives, at pfernandes@justiceatstake.org. Thank you for your time and consideration.

Respectfully,

Bert Brandenburg

Executive Director

717 D Street, NW, Suite 203, Washington, DC 20004 * phone: 202-588-9700 fax: 202-588-9485

THE SIZE OF THE FEDERAL JUDICIARY

STATEMENT OF JOEL F. DUBINA
UNITED STATES CIRCUIT JUDGE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

I want to thank the Committee, and especially Senator Sessions, for giving me the opportunity to submit this statement concerning the issue of whether the Federal Judiciary should be further expanded in size. Since my appointment to the Eleventh Circuit on October 1, 1990, the judges of our court annually have voted whether or not we should ask Congress to authorize more federal judges. Each time our court considers the topic, an overwhelming majority of our members have voted "no!" The judges who feel the strongest about this issue are those who served on our predecessor court, the Fifth Circuit, before Congress divided it in 1981 and created the Eleventh Circuit. They, more than the rest of my colleagues, remember the problems created by serving on a court with 26 judges.

I submit for your consideration several reasons why I believe a smaller judicial body is better. First, collegiality suffers when a court has too many judges. I cannot emphasize enough the importance of collegiality on a federal appellate court. It is not something that just happens—the judges have to work to achieve common respect and collegiality. The larger the court, the more difficult it is to get to know your colleagues. On our court, the judges not only work together, but we socialize together. Socialization helps us develop common interests and goals, in

spite of our differing interpretations of the law. On a smaller court, not only do the judges get to know each other personally, but they begin to build a trust with one another that would be more difficult to achieve on a large court.

Second, it is easier to maintain a cohesive body of law in the circuit when the court is small. When a court is too large, the clarity and stability of the circuit's law suffers. The primary reason federal courts of appeals exist in our nation is to make the law within the circuits clear so the federal district judges will know what the law is and how they should apply it in the individual cases they decide. The larger the court, the more difficult it becomes to maintain a cohesive body of law, because there are more varied opinions to consider.

Third, large courts reduce the efficiency of the court as a whole. Our court sits en banc three times a year; the cases we consider during this time are important and time consuming. However, because we are a smaller court, we have been able to hear oral arguments in as many as three en banc cases, conference the cases, and assign the opinions, all within the same day. On the old Fifth Circuit, it would often take days for the judges to formulate the issues that the lawyers should brief for the en banc court, and it would also take much time for the court to hear oral arguments, conference the cases and assign the opinions. Thus, efficiency suffered. On a court as busy as ours, we judges need to make good use of our time in order to be as efficient as possible. As a court grows in size, judges spend more

of their time monitoring their colleagues' work and less time working on their own cases. This hinders the administration of justice.

I am not alone in my view that a smaller judicial body is better. My colleague, Judge Gerald Bard Tjoflat, wrote an article for the *American Bar Association Journal* in July 1993 entitled "More Judges, Less Justice."[1] In that article, Judge Tjoflat provided sound support for why bigger is not always better. Other circuit judges feel the same way. District of Columbia Circuit Judge Harry T. Edwards, in a law review article on the subject, stated that "to some unquantifiable degree, the impediments to collegiality that stem from the sheer number of members of the court reduce the overall quality of the court's work product."[2] In 1928, Supreme Court Justice Charles Evan Hughes observed that "[e]veryone who has worked in a group knows the necessity of limiting size to obtain efficiency. And this is peculiarly true of a judicial body."[3] When President Franklin Delano Roosevelt tried to pack the Supreme Court, Justice Hughes also

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[1] 79 A.B.A. J., July 1993, at 70–73.

[2] *Id.* at 70 (quoting Hon. Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 919 (1983)).

[3] *Id.* at 71 (quoting CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 238 (Colum. Univ. Press 1966) (1928)).

stated, "[t]here would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide."[4]

Irving Kaufman, former Chief Judge of the Second Circuit, stated that "[a]dditional judgeships are both an inefficient use of scant judicial resources and a disruptive influence on the development of the law."[5] It was also Judge Kaufman's view that "[t]he coherence and uniformity of the law are bound to decline with the addition of new judges. Such instability can have a snowball effect. The judicial workload is increased because more panel hearings and en banc votes are required. And the uncertainty of outcomes resulting from a cacophony of differing opinions can act as a catalyst for new appeals as more litigants find a roll of the appellate dice worth the chance."[6] In sum, it is important in every circuit in the country for the law to remain clear and consistent. When the law is not uniform, the public loses, and the system breaks down.

The final argument for keeping the federal judiciary small is the sheer cost. I have seen studies where the estimated costs to add a new federal appellate judge is in excess of one million dollars. The huge financial cost of adding new judges is hard to justify.

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[4] *Id.* (quoting Letter from Chief Justice Hughes to Senator Burton Wheeler (Mar. 22, 1937)).

[5] *Id.* (quoting Hon. Irving R. Kaufman, *New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator*, 57 FORDHAM L. REV. 253, 257 (1988)).

[6] *Id.* (quoting Kaufman, *supra* note 5, at 259).

Again, I want to thank the Committee for the opportunity to submit this statement, and I hope that as you weigh the views of judges and debate this very important issue, you will come to the conclusion that the vast majority of my colleagues and I share—that a smaller judicial body is a better, more effective, judicial body.

Thank you very much.

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September 9, 2013

Hon. Christopher Coons
Chairman, Senate Judiciary Committee
Subcommittee on Bankruptcy and the Courts
127A Russell Senate Office Building
Washington, DC 20510

Dear Chairman Coons:

To assist the Subcommittee in its consideration of the issues to be presented at its September 10, 2013 hearing on the "Federal Judgeship Act of 2013," a hearing that will consider "the caseload and need for judges nationwide, including the [United States Court of Appeals for the] D.C. Circuit,"[1] we are writing on behalf of Constitutional Accountability Center mainly to address a bill recently introduced by Judiciary Committee Ranking Member Charles Grassley to eliminate immediately three of the 11 authorized judgeships from the D.C. Circuit. Unlike the Federal Judgeship Act, Senator Grassley's proposal is not based on recommendations by the Judicial Conference or on any other study. Rather, it appears to be intended primarily to prevent the President from filling vacancies on this critical court. It should be rejected for this reason.

On April 10, 2013, at the start of the Judiciary Committee's confirmation hearing for then-D.C. Circuit nominee Sri Srinivasan, Senator Grassley announced that he was introducing a "Court Efficiency Act," S. 699, which would, if enacted, eliminate three of the 11 authorized judgeships from the D.C. Circuit, and add one judgeship each to the Second Circuit and the 11th Circuit.[2] Senator Grassley justified S. 699 by highlighting the "imbalance" in the workloads of the three Circuits, and stated that the bill would take effect upon enactment.[3] All of the other Republican members of the Judiciary Committee are original co-sponsors of the bill.

While it is perfectly legitimate for members of the Senate to question whether a specific federal court has too many judges, or too few, based on workload, S. 699 goes far beyond asking such questions -- it answers them. And it does so without the benefit of any of the indicia of neutrality and objectivity that should accompany a proposal to dramatically reduce the size of a federal court. Perhaps the most telling indication that this proposal is not objective or neutral is that in one fell swoop it would eliminate nearly 30% of the seats on the D.C. Circuit, yet it is not based on any study of the court's workload or judicial staffing concluding that such an extraordinary reduction in the number of judges on this important court is warranted. In fact, the proposal ignores recent recommendations of the Judicial

[1] Remarks of Hon. Patrick Leahy, Chairman, Senate Judiciary Committee, Executive Business Meeting (Aug. 1, 2013).
[2] *See* Senator Charles Grassley News Release, "Nomination of Sri Srinivasan and Court Efficiency Act" (April 10, 2013), available at <http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=45436>.
[3] *Id.*

Conference. By letter of April 5, 2013 to Senate Judiciary Chairman Patrick Leahy, a copy of which was also sent to Senator Grassley, the Judicial Conference transmitted to the 113th Congress "the Conference's Article III and bankruptcy judgeship recommendations and corresponding draft legislation for the 113th Congress" (the basis of the proposed Federal Judgeship Act of 2013). With respect to the Circuit Courts, these recommendations included the addition of four judges to the Ninth Circuit and one to the Sixth Circuit; there was no recommendation to add any judges to the Second or 11th Circuits, or to eliminate any seats on the D.C Circuit or not fill any existing vacancies on that court. S. 699 would not only dramatically reduce the size of the D.C. Circuit bench, but it would also add judgeships to courts where the Judicial Conference has not stated they are needed.

Senator Grassley's proposal is based on a comparison of the numbers of cases in the D.C. Circuit with the numbers of cases in other Circuits, equating one D.C. Circuit case with one case in the other courts in terms of workload burden. While this might be an appropriate methodology when comparing the workloads of other appellate courts, it is not appropriate for the D.C. Circuit, which, according to the Federal Judicial Center, has a unique caseload heavily weighted with administrative agency appeals "that occur almost exclusively in the D.C. Circuit and [are] more burdensome than other cases in several aspects,"[4] including having "more independently represented participants per case" and "more briefs filed per case," as well as the fact that they are "more likely to have participants with multiple objectives, involve complex or statutory law, and require the mastery of technical or scientific information."[5]

The unique nature of the D.C. Circuit's workload has been noted repeatedly by those who have served as judges on that court, including no less an authority than the Chief Justice of the United States, John Roberts, who has said:

> It is when you look at the docket that you really see the differences between the D.C. Circuit and the other courts. One-third of the D.C. Circuit appeals are from agency decisions. That figure is less than twenty percent nationwide. About one-quarter of the D.C. Circuit's cases are other civil cases involving the federal government; nationwide that figure is only five percent. All told, about two-thirds of the cases before the D.C. Circuit involve the federal government in some civil capacity, while that figure is less than twenty-five percent nationwide.[6]

As former D.C. Circuit Chief Judge Pat Wald -- who served on that court for more than twenty years -- has explained:

> The D.C. Circuit hears the most complex, time-consuming, labyrinthine disputes over regulations with the greatest impact on ordinary Americans' lives: clean air and water regulations, nuclear plant safety, health-care reform issues, insider trading and more. These cases can require thousands of hours of preparation by the judges, often consuming days of argument, involving

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[4] U.S. General Accounting Office, *Federal Judgeships: The General Accuracy of the Case-Related Workload Measures Used to Assess the Need for Additional District Court and Courts of Appeals Judgeships*, GAO-03-788R, at 10 (May 30, 2003) (quoting Federal Judicial Center, *Assessment of Caseload Burden in the U.S. Court of Appeals for the D.C. Circuit*, Report to the Subcommittee on Judicial Statistics of the Committee on Judicial Resources of the Judicial Conference of the United States (Washington, D.C. 1999)).

[5] *Id.*

[6] John G. Roberts, Jr., "What Makes the D.C. Circuit Different? A Historical View," 92 Va. L. Rev. 375, 376-77 (2006).

> hundreds of parties and interveners, and necessitating dozens of briefs and thousands of pages of record – all of which culminates in lengthy, technically intricate legal opinions.[7]

Judge Wald further noted that "My colleagues and I worked as steadily and intensively as judges on other circuits even if they may have heard more cases. The nature of the D.C. Circuit's caseload is what sets it apart from other courts."[8]

Indeed, precisely because of the unique and complex nature of the D.C. Circuit's caseload, the Judicial Conference does not apply to the D.C. Circuit the caseload formula that it uses to evaluate how many judges are appropriate for the other Circuit Courts.[9] In this respect, the Conference recognizes what Senator Grassley's proposal does not -- that the D.C. Circuit's cases cannot be equated numerically, one for one, with the cases of the other federal appellate courts. Senator Grassley's proposal is based on the flawed comparison of apples and oranges.

In addition, the assertion that the current caseload of the D.C. Circuit requires the elimination of nearly 30% of its authorized judgeships is contradicted by the fact that other recent nominees were confirmed to this same court when the caseload numbers were less. For example, President George W. Bush's nominees Janice Rogers Brown and Thomas Griffith were confirmed to the 10th and 11th seats on the D.C. Circuit in June 2005, even though the caseload per authorized judge (109) was smaller than it is now (132).[10] That number was also smaller when John Roberts was confirmed to the D.C. Circuit in May 2003 -- 83 cases pending per authorized judge – as well as when Brett Kavanaugh was confirmed in May 2006 -- 125 cases pending per authorized judge.[11]

And in February 2003, when there were eight active judges on the D.C. Circuit (the same number as now), Senator Orrin Hatch stated the following in urging the confirmation of Bush nominee Miguel Estrada to the court's ninth seat:

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[7] Patricia M. Wald, "Senate must act on appeals court vacancies," *Washington Post* (Feb. 28, 2013), available at: < http://articles.washingtonpost.com/2013-02-28/opinions/37350554_1_senior-judges-chief-judge-appeals-court-vacancies>.

[8] *Id.* For more information, *see also* Judge Wald's remarks about the D.C. Circuit at the March 25, 2013 discussion of "Why Courts Matter: The D.C. Circuit," here: http://www.americanprogress.org/events/2013/03/14/56746/why-courts-matter-the-d-c-circuit/.

[9] *See* U.S. General Accounting Office, *Federal Judgeships: The General Accuracy of the Case-Related Workload Measures Used to Assess the Need for Additional District Court and Courts of Appeals Judgeships,* GAO-03-788R, at 8, 11 (May 30, 2003).

[10] On March 31, 2005 -- the date closest to the confirmations of Brown and Griffith for which these figures have been published by the U.S. Courts -- there were 1,313 cases pending in the D.C. Circuit, which at the time had 12 authorized judgeships, or 109 cases per authorized judge. The most current published U.S. Courts statistics are as of March 31, 2013, when there were 1,456 pending cases in the D.C. Circuit, or 132 cases per authorized judge. Another way to look at the data is by cases per active judge, measuring the workload of the judges actually on the court. In March 2005, there were nine active judges on the D.C. Circuit, and thus 146 cases per active judge. After Brown's confirmation to the 10th seat, there were 131 cases per active judge, a number that dropped to 119 when Griffith was confirmed. Currently, with only eight active judges on the D. C. Circuit, the caseload is 182 appeals per active judge, 53% higher than it was when Griffith was confirmed. (With all three current vacancies filled, the caseload per active judge would be 132.)

[11] These figures are calculated using the number of cases pending on March 31, 2003 and March 31, 2006, respectively, the closest dates to the confirmations of Roberts and Cavanaugh for which these statistics are published.

> It is a very important court. In fact, next to the Supreme Court, it is the next most important court in the country – no question about it – because the decisions they make affect almost every American in many instances. . . *I might also add that the D.C. Circuit is in the midst of a vacancy crisis unseen in recent memory. Only eight of the court's 12 authorized judgeships currently are filled. . . The D.C. Circuit has not been down to eight active judges since 1980. It is a crisis situation because it is extremely important. The vacancy crisis is substantially interfering with the D.C. Circuit's ability to decide cases in a timely fashion.* As a result, litigants find themselves waiting longer and longer for the court to resolve their disputes. Because so many D.C. Circuit cases involve constitutional and administrative law, this means that the validity of challenged government policies is likely to remain in legal limbo.[12]

As of March 31, 2003, the nearest date to Senator Hatch's speech for which there are published data from the U.S. Courts regarding the D.C. Circuit's workload, the court had 1,001 cases pending, or a workload of only 83 cases per authorized judge. Now, as noted above, that workload is 132 cases per authorized judge. Moreover, what Senator Hatch said about the D.C. Circuit in 2003 remains true today: the court is of vital importance to America and it is currently understaffed, not overstaffed.

Some conservatives who support Senator Grassley's proposal or who have advocated that the Senate not permit the vacancies on the D.C. Circuit to be filled have claimed that President Obama, by complying with his constitutional mandate to nominate people to fill authorized seats on the federal bench, is engaging in "court packing."[13] This of course is an utter misuse of the term, which has its origins in the proposal by President Franklin Delano Roosevelt to add *new* judicial seats to the Supreme Court in an effort to shift the Court's balance – not to a President's simply doing his constitutionally specified job, that is, nominating people to fill existing, authorized judicial *vacancies*.

It should come as no surprise, then, that even some conservatives have had a hard time understanding the "court packing" charge. As Byron York, a Fox News contributor and author of *The Vast Left Wing Conspiracy*, noted, "it doesn't strike me as 'packing' to nominate candidates for available seats."[14] American Enterprise Institute scholar Norm Ornstein said that the claim made him "laugh out loud."[15] Ornstein continued by asking, "How could a move by a president simply to fill long-standing existing vacancies on federal courts be termed court packing?"[16] That's a good question. If anything, it appears that Senator Grassley and other supporters of S. 699 are attempting to maintain the D.C. Circuit's marked ideological imbalance; with six senior judges continuing to hear cases alongside the eight active judges, the court is starkly divided (or packed, one might say), 9-5, in favor of judges appointed by Republican Presidents.

The D.C. Circuit is rightly considered to be the Nation's second most important court, after the Supreme Court. This is because the D.C. Circuit has exclusive or favored jurisdiction over disputes

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[12] 149 Cong. Rec. No. 21, S1953 (daily ed. Feb. 5, 2003) (statement of Senator Hatch, emphasis added), available at: <http://www.gpo.gov/fdsys/pkg/CREC-2003-02-05/pdf/CREC-2003-02-05-pt1-PgS1928-3.pdf#page=25>.

[13] *See, e.g.*, Jennifer Bendery, "Republicans Charge Obama With Court-Packing for Trying to Fill Empty Seats," *Huffington Post* (May 28, 2013), available at: < http://www.huffingtonpost.com/2013/05/28/obama-court-packing_n_3347961.html>.

[14] Byron York, Twitter (May 28, 2013), available at: <https://twitter.com/ByronYork/statuses/339389884672389121>.

[15] Norm Ornstein, "It Might Finally Be Time for the 'Nuclear Option' in the Senate," *The Atlantic* (May 30, 2013), available at: < http://www.theatlantic.com/politics/archive/2013/05/it-might-finally-be-time-for-the-nuclear-option-in-the-senate/276377/>.

[16] *Id.*

involving numerous federal laws and regulations, and is responsible for resolving critically important cases involving national security, environmental protection, employment discrimination, food and drug safety, separation of powers, and the decisions of a wide array of administrative agencies. The full staffing of this court is of nationwide importance. Certainly no decision to effectuate a nearly 30% reduction in the number of judges on this critical court, or to decline to fill authorized vacancies, should be made in a partisan, political manner and without careful study.

Sincerely,

Judith E. Schaeffer
Vice President

Doug Kendall
President
Constitutional Accountability Center

PREPARED STATEMENT OF

THE HONORABLE GERALD BARD TJOFLAT

CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

BEFORE

THE SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

"RESPONDING TO THE GROWING NEED FOR FEDERAL JUDGESHIPS: THE FEDERAL JUDGESHIP ACT OF 2009"

WEDNESDAY, SEPTEMBER 30, 2009

Introduction

Mr. Chairman and members of the Committee, I am Gerald Bard Tjoflat of the United States Court of Appeals for the Eleventh Circuit. I am here today at your invitation to testify about the proposed Federal Judgeship Act of 2009. I do not approach the wisdom of creating the additional judgeships the Act provides with a political or personal agenda. Rather, I approach the creation of judgeships from my experience on the former Fifth Circuit and from my analysis of circuit realignment beginning with the circuit split proposed by the White Commission in 1997. My concern is principally with increasing the size of the courts of appeals, as opposed to the district courts.[1] I was a member of the Fifth Circuit when, in 1979, it was increased from 15 to 26 active judges, and I experienced first hand the considerable disadvantages the increase produced. That same year, the Ninth Circuit was increased from 13 to 23 active judges, and now has 29 active judges.[2] The proposed Act would increase the size of that court to 34 active judges. The problems created by increasing the Fifth Circuit to 26 active judges would have expanded exponentially had the Fifth been expanded to a court of 33 active judges.

In increasing the size of a court of appeals, the Congress must consider the

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[1] The size of a circuit's district courts is necessarily limited by the size of the circuit's court of appeals.

[2] I use the term "active judges" to refer to the number of currently authorized judgeships, not the number of judges currently sitting on the court.

effect the increase has on (1) the court's efficiency, and (2) the stability of the rule of law in the circuit. My experience—and that of others who have given the subject considerable study and thought—is that the increase in circuit court judgeships negatively affects both these areas. Moreover, as the consistency in the rule of law diminishes, the demand for more district judgeships increases for the obvious reason that an unstable rule of law leads to more litigation.

I. Efficiency

The chief argument for increasing the number of appellate judges is to reduce the workload per judge. This seems simple enough, but, from my experience, increasing the number of judges actually creates *more* work. Adding judges decreases a court's efficiency by diminishing the trust and collegiality that are essential to collective decision-making.

One of the most important factors that determines the efficiency with which a court can operate, as well as the quality of its ultimate product, is the degree to which the judges on that court know each other and enjoy a high degree of collegiality. I explained the importance of collegiality in my A.B.A. Journal article entitled *More Judges, Less Justice*: "In a small town, folks have to get along with one another. In a big city, many people do not even know, much less understand, their neighbors. Similarly, judges in small circuits are able to interact with their

colleagues in a much more expedient and efficient manner than judges on jumbo courts."[3] Because appellate judges sit in panels of three, it is critically important that a judge writing an opinion be able to "mind-read" his colleagues. The process of crafting opinions can be greatly expedited if a judge is aware of the perspectives of the other judges on the panel so that he can draft an opinion likely to be amenable to all of them. In a small circuit, where the judges know each other—and each other's judicial philosophy and predispositions—the process of drafting opinions likely to attract the votes of the other judges on the panel is much simpler.

In a circuit the size of the former Fifth Circuit or the current Ninth Circuit, in contrast, the odds are good that you may be sitting on a panel with two strangers (particularly once senior judges, visiting judges, and district judges sitting by designation are taken into account). As Professor Spreng observed in commenting on the situation in the Ninth Circuit, "[B]ecause there are so many Ninth Circuit judges, it is conceivable that years could go by between the time when Judge A had last sat on a calendar or screening panel with Judge B. A number of senior and

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[3] Judge Gerald Bard Tjoflat, *More Judges, Less Justice*, 79 A.B.A.J. 70, 70 (July 1993). As former Attorney General Griffin Bell pointed out, "[W]hen a court becomes too large, it tends to destroy the collegiality among its members . . . ." Letter from Former Attorney General Griffin Bell to Senator Jeff Sessions (June 6, 1997) (on file with author). As the Senate Judiciary Committee has recognized, "The more judges that sit on a circuit, the less frequent a particular judge is likely to encounter any other judge on a three-judge panel. Breakdown in collegiality can lead to a diminished quality of decisionmaking." *Report of the S. Comm. On the Judiciary*

active judges may never have sat on a regular or screening panel with the junior judges appointed in the 1990s."[4] Becoming acclimated to the personalities, views, and writing styles of an unending succession of strangers is much less efficient than working with a smaller group of colleagues who are better known to you.

Additionally, as Judge Wilkinson has pointed out, collegiality leads to better group decision-making.

> [A]t heart the appellate process is a deliberative process, and . . . one engages in more fruitful interchanges with colleagues whom one deals with day after day than with judges who are simply faces in the crowd. Collegiality personalizes the judicial process. It contributes to the dialogue and to the mutual accommodations that underlie sound judicial decisions.[5]

Close interpersonal relationships facilitate the creation of higher-quality judicial opinions. Those relationships also form the basis for interaction and continued functioning when a court faces the most emotional and divisive issues of the day.

Furthermore, the close ties that can be forged on a smaller court allow you to build trust in your colleagues. For example, in a small circuit where the judges

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on the Ninth Circuit Court of Appeals Reorganization Act, S. REP. NO. 104-197, pt. III (1995).

[4] Jennifer E. Spreng, *Proposed Ninth Circuit Split: The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875, 924 (1998); *see also id.* at 893 ("The Ninth Circuit contains more states, covers more territory, boasts more judges, and dispenses justice to more people than any other circuit. If just one of its nine states were a separate circuit, that state would be the third largest circuit in the nation.").

[5] J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1173-74 (1994).

know each other well, if one judge declares that he reviewed the record in a particular case and feels that an error is (or is not) harmless under the circumstances, another judge might feel entirely justified in relying upon that assessment, rather than going through the immensely time-consuming task of reviewing thousands of pages of trial transcript and dozens of boxes of pleadings and exhibits in order to come to the same conclusion himself. If two judges do not know each other and are unfamiliar with each others' judgment, work habits, or style, they are not likely to exhibit such reliance and would be prone to needlessly reproducing each others' efforts.

The benefits of a small court are perhaps most evident when dealing with emergency applications for relief, such as when a litigant seeks an emergency stay of a district court order. Although such applications are considered by a three judge panel, typically only one judge is able to have access to the full record at a time. Because the record tends to be voluminous, there is not always time for all three judges to fully review it. Additionally, because emergency motions can arise at any time, all three judges may not be in a position to immediately review it. In such cases, the rapport and trust that come from working together in a small court allow you to place great stock in the judgment and assessments of your colleagues, thereby allowing the court to handle such emergency matters expeditiously.

Moreover, when you work with another judge repeatedly, you get to know his particular inclinations. You are able to identify arguments he may systematically overlook and are aware of his interpretations of particular doctrines with which you might disagree. Thus, panel judges faced with an emergency petition are familiar with the types of errors their colleagues are most likely to make. This allows judges to prevent mistakes that might otherwise go unrecognized by judges unfamiliar with each others' work.

My concerns with large courts are drawn from personal experience. Having served on both the former Fifth Circuit and now the Eleventh Circuit, I can definitively attest that the entire judicial process—opinion writing, *en banc* discussions, emergency motions, circuit administration, and internal court matters—runs much more smoothly on a smaller court. The Eleventh Circuit has steadfastly opposed efforts to increase the size of the court[6] precisely to maintain an efficient operation.

II. Stability of the Rule of Law

Another regrettable effect of increasing the number of judges is that it leads to inconsistencies within, and uncertainty about, courts' case law. Each judge

[6] Based on the Judicial Conference's threshold factor for determining the need for additional court of appeals judgeships (500 adjusted panel filings), the Administrative Office data for the year ending June 30, 2009, indicate that the adjusted filings for the Eleventh Circuit

brings to the bench his own predispositions and judicial philosophy, and exerts his own "gravitational pull" on the law of the circuit. With 26 judges, the former Fifth Circuit was pulled in 26 different directions. The same would be true with the Ninth Circuit at 34 judges. Both situations make litigants uncertain how matters not squarely addressed by precedent will be handled. It also creates what Justice Kennedy has termed an "unacceptably large risk of intra-circuit conflicts or, at the least, unnecessary ambiguities."[7] With so many panels and judges handling similar issues, the potential for inconsistent dispositions skyrockets.[8] Justice Kennedy explained, "The risk and uncertainty increase exponentially with the number of cases decided and the number of judges deciding those cases. Thus, if Circuit A is three times the size of Circuit B, one would expect the possibility of an intra-circuit conflict in the former to be far more than three times as great as in the latter."[9]

The sheer number of possible panel combinations on the former Fifth Circuit

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would justify a court of 27 judges, rather than 12.

[7] Letter from Justice Anthony Kennedy to Justice Byron White 2 (Aug. 17, 1998), *available at* http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/kennedy.pdf [hereinafter Kennedy Letter].

[8] Spreng, *supra* note 4, at 906 ("In other words, the more judges, the more panel combinations; the more panel combinations, the greater likelihood that any two panels will produce irreconcilable interpretations of the law.").

[9] Kennedy Letter, *supra* note 7, at 3; *see also* Paul D. Carrington, *An Unknown Court: Appellate Caseload and the "Reckonability" of the Law of the Circuit*, *in* RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS

and the current Ninth Circuit is a good indication of the uncertainty and potential for inconsistent rulings in a large circuit. Even putting aside the circuit's senior judges and visiting judges sitting by designation, in the former Fifth Circuit with 26 active judges, there were 2,600 possible three-judge panel combinations. In the Ninth Circuit with 29 active judges, there are 3,654 possible three-judge panel combinations. With 34 active judges, the number would dramatically increase to 5,984 possible three-judge combinations. Whether the same three-judge panel could reconvene in oral argument during the judges' tenures on the court was, and would be, highly unlikely. It is virtually impossible for a court to maintain any degree of coherence or predictability in its caselaw when it speaks with that many voices.

Moreover, while a "case on point" is the gold standard for attorneys, a circuit's law can also become quite confusing and overwhelming when there are simply too many cases on point. Having so many judges produce so many opinions that make similar points in slightly different ways undermines certainty, "creating incentives to litigate that do not exist in jurisdictions with small courts. . . . Individuals find it more difficult to conform their conduct to increasingly indeterminate circuit law and suffer higher litigation costs to vindicate the few

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206, 210 (Arthur Hellman ed., 1990).

remaining clear rights to which they may cling."[10]

One of the most obvious deficiencies with increasing a court to the size of 26, 29, or 34 judges, is that it essentially precludes *en banc* review. An *en banc* hearing is one in which all the judges of a circuit come together to speak definitively about a point of law for that circuit. An *en banc* hearing occurs primarily after multiple panels issue conflicting opinions, a longstanding precedent needs to be reconsidered in light of changed circumstances, or a present-day panel simply errs.

Because of the crucial role *en banc* hearings play in maintaining uniform, coherent circuit law, it is important that each judge of the circuit have a voice in the proceedings. In the Ninth Circuit, due to its size, the majority of its judges are denied the opportunity to participate in most *en banc* hearings. Instead, the court has been forced to resort to "limited" or "mini" *en banc* sessions, in which a panel of 11 judges speaks for the circuit. Due to these "mini" *en bancs*, a minority of judges "definitively" determines the law for the Ninth Circuit. As one writer observed in 1997, "[t]echnically, a mini en banc decision may be reheard by all

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[10] Tjoflat, *supra* note 3, at 70; *see also* Wilkinson, *supra* note 5, at 1174-76 (predicting "a loss in the coherence of circuit law if the size of circuit courts continues to expand. . . . As the number of judges rolls ever upward, the law of the circuit will become more nebulous and less distinct. . . . Litigation will become more a game of chance and less a process with predictable outcomes.").

twenty-eight judges . . . but such a full hearing has not been granted since the mini en banc was authorized in 1978."[11]

The use of limited *en banc* panels has been roundly criticized. Justice O'Connor wrote "[s]uch panels, representing less than one-half of the authorized number of judges, cannot serve the purposes of en banc hearings as effectively as do the en banc panels consisting of all active judges that are used in the other circuits."[12] She also observed that, in 1997, while the Ninth Circuit reviewed only 8 cases *en banc*, the Supreme Court granted oral arguments on 25 Ninth Circuit cases and summarily decided 20 additional ones. "These numbers suggest that the present system in CA9 is not meeting the goals of en banc review."[13] Furthermore, the sheer number of judges on the Ninth Circuit means that such a large number of judicial opinions is produced that it is impossible for judges to grant *en banc* review to correct all important errors once they are found.

Conclusion

The courts of appeals must be limited in size if the law is to possess the clarity and stability the nation requires. As the law becomes unclear and unstable,

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[11] Eric J. Gibbin, Note, *California Split: A Plan to Divide the Ninth Circuit*, 47 DUKE L.J. 351, 378 (1997).

[12] Letter from Justice Sandra Day O'Connor to Justice Byron White 2 (June 23, 1998), *available at* http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/oconnor.pdf.

[13] *Id.*

our citizens—whether individuals or entities like corporations—lose the freedom that inheres in a predictable and stable rule of law. The demand for more judges, if satisfied, will inexorably lead—little by little—to the erosion of the freedoms we cherish. Article III courts are a scarce dispute-resolution resource; rather than expanding the number of judges, Congress should consider limiting those courts' jurisdiction to cases or controversies implicating those cherished liberties.

Thank you very much for your kind attention.

I would be more than happy to answer any questions the Committee might have.

STATEMENT OF PATRICIA M. WALD,
RETIRED CHIEF JUDGE OF THE D.C. CIRCUIT COURT OF APPEALS,
ON COMPLEXITY OF D.C. CIRCUIT CASES
Before the SUBCOMMITTEE ON BANKRUPTCY AND THE COURTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
HEARING ON THE FEDERAL JUDGESHIP ACT OF 2013

September 10, 2013

I have been asked to comment on the complexity of the cases on the D.C. Circuit Court of Appeals' docket as compared to the other 11 circuit courts of appeal. The comparative complexity of its cases is of course only one factor to be considered in deciding the appropriate number of judgeships to enable the Circuit Court to do its work efficiently, but it is a singularly important one. There is virtually unanimous agreement that the kind and mix of cases that come before the D.C. Circuit are exceptionally demanding from a technical standpoint, and uniquely burdensome in terms of sheer time compared to other circuits. Chief Justice John Roberts noted in his 2006 Virginia Law Review article, "What Makes the D.C. Circuit Different?", written while he served on the Circuit, that the D.C. Circuit's caseload is composed of one third appeals from federal agencies (the national figure for all circuits is 20%); combined with another one fourth consisting of other federal civil cases makes up a total of two thirds of the D.C. Circuit's docket involving the federal government rather than disputes between individual parties (the comparable national figure is 25% for all circuits). In the now-Chief Justice's own words "whatever combination of letters you can put together, it is likely that jurisdiction to review that agency's decision is vested in the D.C. Circuit", adding "lawyers frequently prefer to litigate in the D.C. Circuit because there is a far more extensive body of administrative law developed there than in other courts".

Washington Post columnist Glenn Kessler more recently dipped down another layer into these and later statistics gleaned from the Administrative Office of the U.S. Courts that show in 2012 , 45% of D.C. Circuit appeals were administrative appeals which he described as "highly complex and tak[ing] more time to review". This figure he compared to the less than 3% administrative appeals (omitting immigration cases of which the D.C. Circuit rarely has any) that is the national average of other circuits. The most recent figures from the Administrative Office for the year ending June 30, 2013 show that the D.C. figure remains about the same today.

(Table B-3). Minimally then, it seems clear that the D.C. Circuit's docket cannot be rationally compared to other circuits on the basis of raw case numbers alone, regardless of how those calculations are made.

The greater complexity of administrative appeals manifests itself in judge's workloads in several ways, some statistically demonstrable, some not. The D.C. Circuit according to the latest figures has the highest percentage (49.2%) of decisions on the merits rendered after oral argument, in marked contrast to 10 circuits where oral argument is denied in 70-90% of merits cases (63% in the Seventh Circuit). Further, 42% of D.C. Circuit termination decisions on the merits result in written, published opinions, again the highest among the 11 circuits and the D.C. Circuit's 57% unpublished opinion rate ranks lowest among the circuits, the national figure being 88%. (Tables S-1 and S-3). These statistics indicate that a higher percentage of D.C. Circuit cases than those of other courts of appeal merit oral argument and require the research and drafting that attend a formal opinion with precedential value. The larger percentages of appeals accorded summary treatment in other circuits indicates a lesser degree of judicial input for their largest category of cases which are typically disposed of by short memoranda, often relying on a single precedent and/or a few sentences of discussion. It is relatively rare that an administrative agency appeal of the kind heard in the D.C. Circuit, certainly not a rulemaking, could be treated in that fashion, in large part due to the several levels of internal review within the government before an agency can go to court. Also to be noted is that a single massive consolidated appeal in an agency case combining the separate appeals of many organizations and parties will be counted statistically as one appeal even though reading, reviewing and considering the separate arguments of many appellants may take widely disproportionate amounts of time. About 22% of D.C. Circuit appeals in 2013 terminated on the merits were consolidated cases, a vastly greater number than in other circuits.

But it is undoubtedly the nature of the agency appeal cases, especially the rulemakings, that set the D.C. Circuit apart. Agency appeal cases deeply impact every aspect of Americans' lives, the air they breathe, the water they drink, the safety of their workplace, the health care they receive, the security of their investments, the competitive pricing of the goods they buy. These complex regulations which undergird every major government regulatory program-regulations which often consume hundreds of triple-columned, single-spaced Federal Register pages –if challenged and the major ones usually are-almost inevitably pass through the D.C. Circuit's

portal. And because these rules come directly to the appeals court, its judges must do their legal evaluations from scratch without the benefit of lower court's findings available in non-agency appeals. This kind of review takes time. Their complexity is of two dimensions— understanding the underlying factual situations giving rise to the disputes which can be scientific, technological, industrial and often obtuse to non-experts and assessing the legal questions arising from the precepts of administrative law which themselves are often versed in general terms like "preponderance of the evidence", "substantial evidence", "due deference", "in the public interest" and must be applied to those factual situations. It is also of moment that the D.C. Circuit is the court of last resort in such cases except for those few that the Supreme Court elects to hear. In the past the High Court has steered clear of the vast bulk of the monstrous regulatory reviews. But when it does take agency cases, not surprisingly it takes more of them from the D.C. Circuit than from any other. It thus behooves the Circuit judges to do their important work painstakingly and fastidiously since in the final analysis they are responsible for the major part of the development of the body of administrative law that guides the regulatory governance of the nation. Thus it is the D.C. Circuit that will hear the inevitable challenges to the Affordable Care Act's implementing regulations and to the Dodd-Frank Financial Services regulations. Indeed Chief Justice Roberts in his 2006 article acknowledged "the D.C. Circuit's unique character, as a court with special responsibility to review legal challenges to the conduct of the national government...." It goes without saying that to perform that special responsibility the court needs sufficient time and resources; according to Professor John Golden who studied the Circuit's history, "When the D.C. Circuit addresses questions such as the constitutionality of legislative vetoes of agency rulemaking or agency rules of national scope, such as setting national ambient quality standards the significance for policymakers and members of the general public is plain".

The D.C. Circuit has a separate complex litigation track for hearing a handful of the most time-consuming and complex of these regulatory cases; five such are scheduled for the coming year. Neither the Chief Judge nor senior judges customarily sit on these cases (only one senior judge currently has). One example of such a case is *Sierra Club v. Costle*, 657 F2d. 298 (1981) in which I wrote the opinion. It dealt with "the extent to which new coal-fired steam generators that produce electricity must control their emissions of sulfur dioxide and particulate matter into the air". The Petitioners in the appeal (consolidated from 7 separate cases) all filed separate briefs totaling 760 pages setting forth varied arguments and interests. They included the Appalachian

Power Company, the Sierra Club, the Environmental Defense Fund, California Air Resources Board; the Intervenors included the National Coal Association and the Missouri Association of Municipal Utilities; the Respondent was the Environmental Protection Agency assisted by the Department of Justice. Oral argument consumed days and involved many advocates. The environmental groups thought the EPA regulations too lax, the utilities thought them too rigorous. The effects of coal-burning power plants on public health and their importance to our economy were pitted against each other. The Joint Appendix totaled 5600 pages. EPA's explanation of the Rule in the Federal Register took up 43 triple columns of single spaced type. The rule had been several years in the making inside EPA and later undergoing White House review. Our review at the Circuit level encompassed numerous novel procedural issues with serious implications for agency informal rulemaking as well as substantive challenges, culminating in a 227 page slip opinion (with a 26 page appendix of charts) issued within 7 months of argument. While it was being deliberated and drafted, life went on in the Circuit and our panel judges had to maintain their normal schedule of other cases.

Cases accorded special complex schedule treatment as well as other agency cases on the regular calendar, likewise entailing issues of enormous national import and likewise extremely time consuming are, if anything, more typical of the D.C. Circuit's docket now than during my tenure. A prime example is the area of climate control. The D.C. Circuit has exclusive jurisdiction to hear challenges to national regulations promulgated under several major environmental statutes, including notably the Clean Air Act. A 2008 study prepared by then-chair of the House Energy & Commerce Committee, Henry Waxman, reported that between 2002 and 2008, the D.C. Circuit decided 94 cases involving challenges to EPA decisions implementing the Clean Air Act alone. During subsequent years, the Circuit has reviewed a continuing stream of highly significant and complex Clean Air Act regulatory decisions by the current administration including an August 20, 2013 ruling on sewage sludge incinerator standards, a July 12, 2013 ruling on ethanol and other non-fossil-fuel carbon dioxide sources, a January 4, 2013 ruling on two EPA regulations concerning airborne particulate matter, and a June 2012 decision (now on review before the Supreme Court) striking down EPA's "good neighbor rule" regulating individual states' contributions to air pollution levels in neighboring downwind states.

The environmental area's intimate relationship to the Circuit is paralleled by other agencies such as communications (FCC) and energy (FERC). Mid-2013 figures show that 68% of the Court's consolidated cases terminated on the merits involved agency rulemakings. (Tables B-3 and S-1).

Finally, in the interests of brevity, I will only mention the extraordinary prominence of the Circuit in constitutional as well as regulatory jurisprudence, setting the stage for the Supreme Court on such issues as executive privilege, attorney client privilege for government lawyers, the survival of that privilege after death, the application of the recess clause to executive appointments, First Amendment rights to demonstrate in front of embassies, the application of constitutional guarantees to "enemy combatants" (all appeals from habeas corpus petitions by Guantanamo detainees and from military commission convictions are heard exclusively by the D.C. Circuit). None of these cases are "average" or "typical" for federal courts.

In sum it seems highly relevant to consider seriously the kinds of cases the D.C. Circuit hears with atypical frequency when deciding on its special judicial needs.